Case Law Involving Matters Relating to the Local Boundary Commission

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368 P.2d 540, Fairview Public Utility Dist. No. One v. City of Anchorage, (Alaska 1962)

FAIRVIEW PUBLIC UTILITY DISTRICT NUMBER ONE, William E. Moore, Fern Williams, Glenn H. Eagon, Al Otter, and Pauline Truex, Appellants,

v.

CITY OF ANCHORAGE, a municipal corporation, Appellee.
Lawrence HAWK et al., Appellants,

v.

FAIRVIEW PUBLIC UTILITY DISTRICT NUMBER ONE et al., and City of Anchorage, a municipal corporation, Appellees.

Nos. 69, 71.
Supreme Court of Alaska.
Feb. 2, 1962.

FAIRVIEW PUBLIC UTILITY DISTRICT NUMBER ONE, William E. Moore, Fern Williams, Glenn H. Eagon, Al Otter, and Pauline Truex, Appellants,

v.

CITY OF ANCHORAGE, a municipal corporation, Appellee.

Lawrence HAWK et al., Appellants,

v.

FAIRVIEW PUBLIC UTILITY DISTRICT NUMBER ONE et al., and City of Anchorage, a municipal corporation, Appellees.

Nos. 69, 71.

Supreme Court of Alaska.

Feb. 2, 1962.

Proceeding concerning validity of annexation of public utility district by city. The Superior Court, Third District, Edward V. Davis, J., entered summary judgment for city and appeal was taken. The Supreme Court, Dimond, J., held that district was dissolved when annexation took place without any election procedure, and that residents and property owners of utility district were not deprived of liberty or property without due process because they were not permitted to vote as to whether district should be annexed.

Affirmed.

1. Municipal Corporations ⇐35

Annexation of public utility district by city became effective by end of legislative session even though house of representatives passed concurrent resolution disapproving boundary change recommended by Local Boundary Commission, where senate refused to concur in resolution of disapproval. Const. art. 10, § 12; A.C.L.A.Supp. §§ 2A-1-7, 16-7-2.

2. Appeal and Error ⇐758(3)

Statement of points on appeal merely saying that appellants intended to rely upon Fourteenth and Fifteenth Amendments to federal Constitution and upon Supreme Court's decision in named case was insufficient in that it failed to inform opposing party and court of matters to be decided. Alaska Supreme Court Rules, rule 9(e); A.C.L.A.Supp. § 49-2-13; A.C.L.A.1949, § 16-1-5.

3. Municipal Corporations ⇐28

Local Boundary Commission was empowered to recommend annexation of utility district to city prior to establishment of boroughs and enactment of legislation for integration of existing special service districts with borough government A.C.L.A. Supp. §§ 2A-1-7, 16-7-2; Const. art. 10, §§ 1, 2, 12.

4. Municipal Corporations ⇐28

Method for making boundary changes contemplated by constitution was operative upon 1959 statutes creating Local Boundary Commission and conferring powers upon it. A.C.L.A.Supp. §§ 2A-1-7, 16-7-2, 16-1-29i, 49-2-13.

5. Municipal Corporations ⇐35

Utility district was dissolved when annexed by city, without necessity of election of residents of district. A.C.L.A.Supp. § 49-2-13; A.C.L.A.1949, § 16-1-5.

6. Constitutional Law ⇐93(1)

Those who reside or own property in area to be annexed by municipality have no vested right to insist that annexation take place only with their consent.

7. Constitutional Law ⇐278(2)

Residents and property owners of utility district were not deprived of liberty or property without due process because they were not permitted to vote as to whether district should be annexed by city. A.C.L.A.Supp. §§ 2A-1-7, 16-7-2; U.S.C.A. Const. Amend. 14, § 1.

8. Municipal Corporations ⇐35

Residents of public utility district were not entitled to election of new directors where district had been annexed to city and dissolved by operation of law. A.C.L.A. Supp. §§ 2A-1-7, 16-7-2.

Pauline Truex, in pro. per.

Leonard Grau, in pro. per.

Richard O. Gantz, City Atty., Anchorage, for appellees.

Before NESBETT, Chief Justice, and DIMOND and AREND, Justices.

DIMOND, Justice.

These appeals concern the validity of the annexation of the Fairview Public Utility District to the City of Anchorage.

Following a constitutional directive [1], the legislature in 1959 established a Local Boundary Commission.[2] It was authorized to consider and recommend to the legislature any proposed local government boundary change, which would become effective no later than the end of the legislative session unless disapproved by a resolution concurred in by a majority of the members of each house.[3]

[1] In 1960 the Commission presented to the legislature its recommendation that the Fairview Public Utility District, an area entirely surrounded by the City of Anchorage, be annexed to the city.[4] The House passed its concurrent resolution disapproving the proposed boundary change.[5] The Senate, however, refused to concur in the resolution of disapproval.[6] This meant, in the language of the constitution and the statute, that the annexation became "effective" by the end of the legislative session, if not earlier.[7]

Following the adjournment of the legislature, the city commenced this action for a declaratory judgment. It asked the court to determine that the District had been dissolved, that the city was the legal successor to all assets of the District, and that a date be set for winding up all affairs of the District and transferring its assets to the city. The complaint also sought to restrain the District and its board of directors from incurring any further obligations without the city's written consent. The defense primarily relied upon was that the failure of the legislature to disapprove the Commission's recommendation for annexation could not effect the dissolution of the District, since a dissolution could be validly effected only by the consent of the voters within the District pursuant to an election held in accordance with statute.[8]

The court entered a summary judgment, holding that the District had been validly annexed to the city, and was dissolved as a matter of law at the time of annexation. The court determined that the city was the legal successor to the District—entitled to all of its assets and charged with its liabilities and governmental functions. A master was appointed to determine the assets and liabilities, and the District's board of directors was ordered, after such determination had been made, to pay the District's outstanding obligations and to transfer any remaining assets to the city.

1. Alaska Const. art. X, § 12.

2. SLA 1959, ch. 64, § 7 (§ 2A-1-7 ACLA Cum.Supp.1959).

3. Alaska Const. art. X, § 12; SLA 1959, ch. 185, § 2 (§ 16-7-2 ACLA Cum.Supp. 1959). The 1959 act was repealed and superseded by SLA 1960, ch. 45.

4. Local Boundary Committee, Proposed Boundary Change, Recommendation No. 2. 1960 Alaska House Journal 64-65.

5. House Concurrent Resolution No. 36, 1960 Alaska House Journal 477.

6. The resolution was indefinitely postponed by the Senate on March 18, 1960. 1960 Alaska Senate Journal 598.

7. In identical language both the constitution (Art. 10, § 12) and the statute then in effect (SLA 1959, ch. 185, § 1) provided that a proposed boundary change "shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house." It is not material in this case to decide whether the effective date of the change was earlier than March 29, the end of the legislative session.

8. Section 49-2-13 ACLA Cum.Supp.1957 allows the dissolution of public utility districts in various circumstances, one of which is when "the whole or the integral part of a district becomes annexed to a incorporated city." The procedure to be followed is that established for the dissolution of municipal corporations by § 16-1-5 ACLA 1949. That statute calls for an election and requires a plurality of three-fifths of the votes cast to effect dissolution.

[2] It is difficult to determine what appellants specifically rely upon as error. The statement of points on appeal, required by Supreme Court Rule 9(e), merely says in broad terms that the appellants "intend to rely upon" the Fourteenth and Fifteenth Amendments to the federal constitution, and upon the Supreme Court's decision in Gomillion v. Lightfoot.[9] Such a statement does not serve the purpose of the rule, for it fails to inform the opposing party and the court of matters we shall be called upon to decide.

The appellants' brief is not particularly enlightening, because it does not contain a specification of errors as required by rule.[10] It poses five questions under the heading "Issues Presented" [11], but certain of those questions are beyond the issues properly presented to us for decision. Because of this, we consider it important at the outset to state explicitly what is before us for review and what is not.

In the first place, we are not required to decide whether the court had the authority to appoint a receiver for the District. If one had been appointed, there would be a question as to the propriety of such action.[12] But the court did not appoint a receiver; instead it appointed a master. He was not to exercise any governmental function of the District, but was authorized only to make investigations, find facts, and make reports to the court. This was within the proper scope of a master's functions and powers as provided by rule.[13]

Neither are we obliged to determine whether the statutes pertaining to the dissolution of a public utility district are still valid and in force. The court below held that the District had been dissolved as a matter of law when annexation took place, and that this occurred when the legislature failed to disapprove the Commission's recommendation for annexation. It was unnecessary for the court to decide whether dissolution might also have been effected under the election procedure provided by statute.[14] The question is therefore not before us, and we express no opinion concerning it.

From an examination of the remaining "issues presented", the statement of points, and the argument in the brief, we believe that there are three questions appropriately before us for decision: (1) whether the Boundary Commission could validly exercise the powers conferred upon it; (2) whether the District was dissolved when annexed to the city; and (3) whether the annexation and dissolution of the District, effected without the consent of the voters within the District, deprived the appellants of any rights protected by the Fourteenth

9. 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

10. Supreme Ct.R. 11(a) (6) provides in part that the appellant's brief shall contain "[a] specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. * * * When findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

11. These read as follows:

1. Was the purported annexation of the Fairview Public Utility District, Number One, to the City of Anchorage legal and in accordance with law?

2. Did the Court have the authority to appoint a receiver for the Fairview Public Utility District?

3. Did the City have the authority to commence municipal proceedings without an election showing consent by the people of the area affected?

4.. Did the City of Anchorage have the authority to encumber the real and personal property of the people in the Fairview Public Utility District, without their consent?

5. Are the statutes pertaining to the dissolution of any Public Utility District valid and in force?

12. In Wood v. Gray, No. 41, 359 P.2d 951, 955 (Alaska 1961), we held that the court did not have authority to appoint a receiver for a public utility district.

13. Civ.R. 53.

14. Section 49-2-13 ACLA Cum.Supp.1957, supra note 8.

and Fifteenth Amendments to the federal constitution.

[3] The first question has to do with Article X of the state constitution. Its purpose, as stated in Section 1, is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. In Section 2 it is stated that all local government powers shall be vested in boroughs and cities. The sections that follow provide for the establishment of organized and unorganized boroughs, for the incorporation and government of cities, and for the relationships that are to exist between these two units of self-government. Section 12 calls for the establishment of a local boundary commission, and defines the powers it is to have. The last section provides that special service districts existing at the time a borough is organized shall be integrated with the government of the borough as provided by law.

From these provisions appellants argue that the Local Boundary Commission was not intended to function as it did here until such time as boroughs had been established and necessary legislation had been enacted for integration of existing special service districts with borough government. It would be only after those events had taken place, appellants contend, that the Boundary Commission could consider and present to the legislature proposed local government boundary changes. In the intervening period, a boundary change resulting from annexation of a special service district to a city could be accomplished only by the petition-election procedure provided by a law enacted prior to the effective date of the constitution.[15]

That construction of Article X is neither required by the plain language of the constitution nor suggested by the proceedings of the constitutional convention. Section 12 says that a local boundary commission shall be established by law in the executive branch of the state government, that it may consider any proposed local government boundary change, and that it may present proposed changes to the legislature. It does not say that these things were not to take place until certain other events had occurred, such as the establishment of boroughs.

The convention proceedings militate against the position adopted by appellants. Article X was drafted and submitted by the Committee on Local Government, which held a series of 31 meetings between November 15 and December 19, 1955. An examination of the relevant minutes of those meetings shows clearly the concept that was in mind when the local boundary commission section was being considered: that local political decisions do not usually create proper boundaries and that boundaries should be established at the state level.[16] The advantage of the method proposed, in the words of the committee—

> * * * lies in placing the process at a level where area-wide or statewide needs can be taken into account. By placing authority in this third-party, arguments for and against boundary change can be analyzed objectively.[17]

This expressed need for state adjustment of local boundaries was of immediate concern, and not something that the delegates considered would arise only after a borough government had been formed.[18] Following

15. SLA 1957, ch. 183 (§§ 16-1-29-29n ACLA Cum.Supp.1957), as amended, SLA 1959, ch. 103 (§ 16-1-29h ACLA Cum.Supp.1959).

16. Alaska Constitutional Convention Minutes of Committee on Local Government, Nov. 28 and Dec. 4, 1955. (This and all subsequent statements and quotes concerning proceedings of the Alaska Constitutional Convention refer to Records of the Alaska Constitutional Convention, now in the custody of the Secretary of State, Juneau, Alaska.)

17. Alaska Constitutional Convention, Commentary on Proposed Article on Local Government, Dec. 19, 1955 at 6.

18. Alaska Const. art. X, § 3, states in the first sentence "The entire State shall

World War II the City of Anchorage, the largest municipality in Alaska, experienced such a rapid growth that it soon outgrew its boundaries, and the population of adjacent and contiguous areas became greater than that of the city. This resulted in efforts by the city to annex a number of these heavily populated and unincorporated areas. Those efforts were met by the most determined opposition. In a 1954 case involving the attempted annexation of adjacent territory, Judge Folta remarked:

> "Every impediment and dilatory tactic has been employed by the opponents of annexation, except the homesteaders, to obstruct and harass the city in every move in connection with its efforts to extend its boundaries in the traditional manner to include the adjacent areas. Such opposition does not appear to be in the public interest or in good faith.[19]

In 1955 there were petitions for the annexation of three additional areas adjacent to the city. Again there were protests and concerted opposition, which required determination by the Territorial District Court. In his written opinion Judge Folta commented on the history of the growth of urban areas, and the deficiencies in existing procedures for annexation. He said:

> "The areas sought to be annexed are a part of one compact, urban community comprising the metropolitan area of Anchorage, and, except for the invisible corporate boundaries, are a part of the city's social and economic existence. The real boundaries extend away beyond the corporate boundaries. Moreover, not only do the streets of the city extend through these areas, but they bear the names originally given them by the city and the areas themselves are indistinguishable from that part of the city adjacent thereto. The opposition in part is traceable to the failure of the city during the boom to extend its facilities and services into the areas as they developed. This delay resulted in the extension of privately owned utilities and the organization of public utility districts. The situation is such that the annexation law appears to be inadequate, and gerrymandering, or the appearance thereof, would appear to be excusable in attempting to cope with it; otherwise it may well develop that several municipalities will be carved out of this one community, each with a government of its own, resulting in a multiplication of facilities and services, increased tax burdens, and inevitable jurisdictional conflict and chaos. Henrico County, Windsor Farms, Inc. v. City of Richmond, 177 Va. 754, 760, 15 S.E.2d 309. The Court is not going to lend itself to the imposition of a hydra-headed government on the people of a single urban area unless it has no alternative under the law." [20]

Rejecting the arguments in opposition, the court ordered an annexation election "so that the people may determine for themselves whether the City of Anchorage is to be allowed to expand in the traditional manner or be put in a strait jacket." [21]

[4] We cannot assume that when the delegates to the constitutional convention assembled later in 1955, they were unaware of these obstacles faced by Alaska's cities. We cannot assume that they were insensitive to the inadequacies inherent in a system where needed municipal expansion

be divided into boroughs, organized or unorganized." It was not until 1961 that the legislature enacted a statute providing for the establishment of boroughs. SLA 1961, ch. 146 effective Oct. 1, 1961.

19. Annexation to the City of Anchorage, 15 Alaska 67, 69, 128 F.Supp. 717, 718 (D.Alaska 1954).

20. In re Annexation to City of Anchorage, 15 Alaska 504, 509, 129 F.Supp. 551, 554 (D.Alaska 1955).

21. Id. at 510 (129 F.Supp. at 554).

could be frustrated if the electors in a single urban area outside of municipal boundaries did not agree to annexation.[22] In the light of these contemporary realities, we cannot assume that the adjustment of local boundaries at a state level was intended to be delayed pending the formation of boroughs. We must assume that the convention would have used specific language to accomplish that result. We hold that the method for making boundary changes, contemplated by Article X, Section 12 of the constitution, was operative upon the enactment of the 1959 statutes creating a Local Boundary Commission [23] and conferring powers upon it.[24]

[5] Appellants contend that the District was not dissolved when annexation took place; that this could be accomplished only by the election procedure set forth by statute.[25] We disagree. This would defeat the chief purpose of annexation, which was to do away with two separate governments in a single community, and thus avoid multiplication of facilities and services, duplication of tax burdens, and inevitable jurisdictional conflict and chaos.[26] When annexation was effected the District was extinguished, and its property, powers and duties were then vested in the city.[27]

Our conclusion is not refuted by a 1957 statute which provides for dissolution with consent of the voters when "the whole or the integral part of a district becomes annexed to an incorporated city." [28] This has application only where annexation takes place under the petition-election procedure [29] which was the only means of annexation in effect prior to the time the state constitution became effective.[30] It has no application where annexation takes place under the different method established by Article X, section 12 of the constitution.

Appellants next contend that their constitutional rights were violated when they were not permitted to hold an election and vote as to whether annexation should take place. They rely specifically on the due process clause of the Fourteenth Amendment, and on the Fifteenth Amendment as applied in the recent case of Gomillion v. Lightfoot.[31]

[6, 7] Appellants do not point out, nor do we perceive, in what respect there has been a deprivation of "liberty, or property, without due process of law." [32] The determination of what portions of a state shall be within the limits of a city involves an aspect of the broad political power of the state which has always been considered a most usual and ordinary subject of legislation.[33] The state may permit residents of local communities to determine annexation questions at an election. But when this has been done, the state is not irrevocably committed to that arrangement. If the citizens of the state, in adopting a constitu-

22. In 1955 a proposal for annexation would be defeated if at least fifty-five percent of the votes cast in the area sought to be annexed were not in favor of the proposal. SLA 1951, ch. 7, § 2. In 1957 this was changed to fifty percent. SLA 1957, ch. 183, § 10 (§ 16-1-29i ACLA Cum.Supp.1957).

23. SLA 1959, ch. 64, § 7 (§ 2A-1-7 ACLA Cum.Supp.1959).

24. SLA 1959, ch. 185 (§ 16-7-2 ACLA Cum.Supp.1959).

25. Section 49-2-13 ACLA Cum.Supp.1957, supra note 8.

26. In re Annexation to City of Anchorage, 15 Alaska 504, 509, 129 F.Supp. 551, 554 (D.Alaska 1955).

27. In re Sanitary Board of East Fruitvale Sanitary Dist., 158 Cal. 453, 111 P. 368, 370 (1910); Dickson v. City of Carlsbad, 119 Cal.App.2d 809, 260 P.2d 226 (1953).

28. SLA 1957, ch. 130 (§ 49-2-13, First, ACLA Cum.Supp.1957).

29. SLA 1957, ch. 183 (§§ 16-1-29-29n ACLA Cum.Supp.1957).

30. The state constitution went into effect on January 3, 1959.

31. 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

32. U.S.Const. amend. XIV, § 1.

33. Kelly v. City of Pittsburgh, 104 U.S. 78, 81, 26 L.Ed. 658, 659 (1881); 1 Anticau, Municipal Corporation Law § 1.15 at 30 (1958).

tion, decide that it is in the public interest to establish another election procedure, there is no constitutional obstacle to that course of action. Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just that of the local community.[34] There has been no infringement or deprivation of rights protected by the Fourteenth Amendment.

The Fifteenth Amendment and the Supreme Court's decision in the Gomillion[35] case are not pertinent. They are concerned with the denial of a citizen's right to vote because of his race or color. That factor is not involved in this case.

[8] In a companion case (No. 71) a number of residents of the District commenced an action against the District and its board of directors to compel the latter, by mandatory injunction, to hold an election in order that new directors could be elected—the terms of the others having expired. The City of Anchorage moved to intervene, claiming that because the District had been annexed to the city and thus dissolved by operation of law, no purpose could be served by the election of new directors who would have no functions to perform. The court dismissed the action, holding that its decision in the prior action brought by the City for a declaratory judgment was controlling.

What we have said above as to the validity and effect of the annexation of the Fairview District to the City of Anchorage disposes of this second appeal. There would be no sense in requiring the election of a board of directors for a public utility district which no longer was in existence.

The judgments are affirmed.

34. Cf. Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907); Mount Pleasant v. Beckwith, 100 U.S. 514, 524–525, 25 L.Ed. 699, 701 (1880).

35. Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

Charles C. MERRILL, Appellant,

v.

Margaret F. MERRILL, Appellee.

No. 77.

Supreme Court of Alaska.

Feb. 6, 1962.

Wife's action for divorce in which the Superior Court of the Third Judicial District, J. Earl Cooper, J., granted the wife a divorce and awarded her $35,000 and the husband appealed. The Supreme Court, Arend, J., held that the findings were insufficient to show the basis on which $35,000 award was made and the cause would be remanded for making appropriate findings and if this could not be done, the trial court should grant a new trial.

Judgment vacated and cause remanded with directions.

1. Divorce ⇐252, 286

Division of property between parties in divorce action rests in discretion of trial judge and Supreme Court will not disturb division unless clearly unjust. A.C.L.A. 1949, § 56–5–13.

2. Divorce ⇐285

Supreme Court when called upon to review division of property in divorce action needs to know the ultimate facts found. A.C.L.A.1949, § 56–5–13.

3. Trial ⇐394(1)

Requirement that in all cases tried on facts without jury court shall find facts specially and state separately its conclusions of law is mandatory, and must be reasonably complied with. Alaska Rules of Civil Procedure, rule 52(a).

4. Trial ⇐395(2)

Trial court, when case is heard without jury, has duty to show by sufficiently de-

388 P.2d 263, Walters v. Cease

Benjamin O. WALTERS and Frank Mullen, Petitioners,

v.

Ronald CEASE, Director, Local Affairs Agency, Hugh J. Wade, Secretary of State, and the State of Alaska, Respondents

No. 447.
Supreme Court of Alaska.
Jan. 15, 1964.

Benjamin O. WALTERS and Frank Mullen, Petitioners,

v.

Ronald CEASE, Director, Local Affairs Agency, Hugh J. Wade, Secretary of State, and the State of Alaska, Respondents.

No. 447.

Supreme Court of Alaska.

Jan. 15, 1964.

Action for declaratory judgment. The Superior Court, Third Judicial District, James M. Fitzgerald, J., denied preliminary injunction, and the plaintiffs petitioned for review. The Supreme Court, Arend, J., held that the filing of a referendum petition does not suspend the effect or operation of the act referred; if the act is rejected by the people in a referendum election it, nevertheless, remains in full force and effect until 30 days after certification of election returns by Secretary of State.

Order denying preliminary injunction sustained and case remanded for further proceedings.

1. Appeal and Error ⇐100(1)
Certiorari ⇐17

Order denying motion for preliminary injunction is not an appealable order but is one which Supreme Court may consider on petition for review. Alaska Rules of Supreme Court, rule 23(a).

2. Certiorari ⇐15

The question as to whether exercise by people of referendum provisions of Constitution suspends effective date of act of Legislature is of sufficient substance and importance as to warrant the granting of a petition for review of an order denying motion for preliminary injunction designed to enjoin officers from taking any action under authority which might have been conferred upon them by the act. Alaska Rules of Supreme Court, rules 23(a), 24(1); Const. art. 11, §§ 1–7.

3. Constitutional Law ⇐16

Interpretation of proposed constitutional provision by committee on styling and drafting stood on more solid footing than an opinion voiced by individual member of constitutional convention and could be resorted to by the Supreme Court in determining intent of constitutional convention.

4. Constitutional Law ⇐16

The report of committee as to meaning of proposed constitutional provision was not a valuable aid for ascertaining intention of constitutional convention where proposal to which report was addressed was later amended so as to materially change its meaning.

5. Statutes ⇐365

The word "void" in constitutional provision that act rejected by referendum is void 30 days after certification means ineffectual, having no legal force or binding effect; the antithetical terms are effectual, having legal force and binding effect. Const. art. 11, § 5.

See publication Words and Phrases for other judicial constructions and definitions.

6. Statutes ⇐357, 365

The filing of a referendum petition does not suspend the effect or operation of the act referred; if the act is rejected by the people in a referendum election it, nevertheless, remains in full force and effect until 30 days after certification of election

returns by Secretary of State. Const. arts. 2, 11; AS 15.45.440.

Ted Stevens, Anchorage, for petitioners.

George N. Hayes, Atty. Gen., John K. Brubaker, Asst. Atty. Gen., Juneau, for respondents.

Before NESBETT, C. J., and DIMOND and AREND, JJ.

AREND, Justice.

The petitioners commenced this action on September 4, 1963, in the superior court for a declaratory judgment that chapter 52, SLA 1963, known as the Mandatory Borough Act and hereinafter referred to as the act, is unconstitutional. At the same time they asked the court to enjoin the respondents from taking any action under the authority which might have been conferred upon them by the act. About one month later the petitioners moved for a preliminary injunction designed to enjoin the respondents from proceeding to organize boroughs [1] under the act until the qualified voters of the state should have had an opportunity to approve or reject the act at a referendum election to be held in August, 1964.

After oral argument and the submission of written memoranda by the parties, the superior court held that the petitioners were not entitled to a preliminary injunction. In so ruling the court refused to accept the petitioners' claim that the referral of a legislative act to the voters under the referendum provisions of the state constitution postpones the effective date of the act pending the outcome of the referendum election.

[1, 2] As the order of the court denying the motion is not an appealable order but one which we may consider on petition for review,[2] and as the question of whether the exercise by the people of the referendum provisions of the constitution suspends the effective date of an act of the legislature is of sufficient substance and importance to justify deviation in this case from the normal appellate procedure and to require our immediate attention,[3] we hereby grant review.

Both parties concede that the referendum provisions of the Alaska Constitution are unique in that they do not specifically state whether the referral of an act of the legislature does or does not suspend the effective date of the act. The pertinent sections of article XI of the constitution, entitled "Initiative, Referendum, and Recall," provide as follows:

> "Section 1. * * * The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum.
>
> "Section 2. * * * An initiative or referendum is proposed by an application * * * signed by not less than one hundred qualified voters as sponsors, and shall be filed with the secretary of state. If he finds it in proper form he shall so certify. * * *
>
> "Section 3. * * * After certification of the application, a petition containing a summary of the subject matter shall be prepared by the secretary of state for circulation by the sponsors. If signed by qualified voters, equal in number to ten per cent of those who voted in the preceding general election and resident in at least two-thirds of the election districts of the State, it may be filed with the secretary of state.

1. The borough in Alaska is a political subdivision of the state for governmental purposes and corresponds generally to the county in other states. Under the Alaska Constitution all local government powers are vested in boroughs and cities. Boroughs, organized or unorganized, are to be established according to standards of population, geography, economy, transportation and other factors, provided by law. Each borough is to embrace an area and population with common interests to the maximum degree possible. Alaska Const., art. X, §§ 2, 3.

2. See Supreme Ct. R. 23(a).

3. See Supreme Ct. R. 24(1).

"Section 4. * * * [Relates only to the initiative.]

"Section 5. * * * A referendum petition may be filed only within ninety days after adjournment of the legislative session at which the act was passed. The secretary of state shall prepare a ballot title and proposition summarizing the act and shall place them on the ballot for the first statewide election held more than one hundred eighty days after adjournment of that session.

"Section 6. * * * If a majority of the votes cast on the proposition favor the rejection of an act referred, it is rejected. The secretary of state shall certify the election returns. An initiated law becomes effective ninety days after certification * * *. An act rejected by referendum is void thirty days after certification. Additional procedures for the initiative and referendum may be prescribed by law.

"Section 7. * * * The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety."

The petitioners take the position that the initiative and referendum, reserved to the people by the constitution, are a part of the original legislative process. Therefore, they claim, since Alaska has no constitutional provision to the contrary, article XI must be interpreted to mean that the filing of a referendum petition suspends the operation of the act referred. This, they say, was the intent and understanding of the delegates to the constitutional convention and is expressed in the report of the Committee on Direct Legislation, Amendment and Revision when it submitted to the convention its Proposal No. 3 as an article for inclusion in the constitution, relating to the initiative, referendum and recall. We have examined the files and recorded proceedings of the constitutional convention and find therein that on December 16, 1955, Delegate Taylor, commenting from the floor of the convention on Proposal No. 3, expressed his opinion that the filing of a referendum petition would suspend the act referred unless it contained an emergency clause.[4] About one month later, Delegate Sundborg, speaking at the convention as chairman of the Committee on Styling and Drafting on the restyled Proposal No. 3, stated:

"In the case of the referendum, *it was our feeling that if some law has been found not desirable by the public they should not have to live under it for a whole 90 days after they have rejected it but 30 days would be enough.* We felt that time should be provided after certification because it might be a very close election and it would be decided by only a very few votes. The people of the state would not know right up to the very moment the secretary of state certified, whether the matter had been approved or rejected and *we felt that some time should be allowed so that all citizens of the state would have some warning of a law that was then on the books becoming void* * * *"[5] [Emphasis supplied.]

[3] The Committee on Styling and Drafting obviously felt that an act referred is a law in operation until thirty days after certification. This interpretation of the committee, which is diametrically opposed to the view expressed earlier by Delegate Taylor, stands on more solid footing than an opinion voiced by any individual mem-

4. Alaska Constitutional Convention, Transcript of Proceedings, December 13–16, 1955, pp. 934–36. (Alaska Legislative Council—preliminary draft)

5. Alaska Constitutional Convention Minutes, January 24, 1956, pp. 25–26.

ber of the convention and may be resorted to by this court in determining the intent of the constitutional convention.[6]

[4] We turn next to the report of the Committee on Direct Legislation, Amendment and Revision dated December 9, 1955, and submitted to the convention along with Proposal No. 3. This report stated in part that the referendum "permits the people to require that laws passed by the Legislature be referred to a vote of the people before taking effect."[7] While such a statement might have been a valuable aid for ascertaining the intention of the convention with respect to the constitutional provision then under consideration,[8] it loses any value it may have had because Proposal No. 3, to which the committee report of December 9 had been addressed, was later amended so as to materially change its meaning.[9]

To clarify, on December 9, the Article on Direct Legislation (Proposal No. 3) provided in section 2 that

> "The people reserve the power to require, by petition, that laws enacted by the legislature be submitted to the voters for approval or rejection."[10]

It was this section, according to the committee report, which prevented a law passed by the legislature from taking effect before it had been approved by the people on a referendum. The section was later combined with another section which read

> "Section 1. The people reserve the power by petition to propose laws and to enact or reject such laws at the polls".[11]

This combination resulted in section 1 of article XI of the constitution which now provides:

> "The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum."[12]

It is also significant that Proposal No. 3 on December 9 provided in section 4 thereof that "the question on referendum shall be submitted to the voters by ballot title *not later than 120 days after the filing of a petition against the measure.*"[13] [Emphasis supplied.] This provision was later changed to read:

> "Questions on referendum shall also be submitted to the voters by ballot title *at the first statewide election occuring* [*sic*] *more than one hundred twenty (120) days after adjournment of the legislature which passed the law being referred.*"[14] [Emphasis supplied.]

Further, we note that the draft of Proposal No. 3, dated December 9, contained no such provision as we find in article XI,

6. Starr v. Hagglund, 374 P.2d 316, 319 (Alaska 1962).

7. Proposal No. 3 and the "Commentary" thereon by the Committee on Direct Legislation, Amendment and Revision, as well as all minutes and other proceedings of the constitutional convention are contained in the Records of the Alaska Constitutional Convention, now in the custody of the Secretary of State, Juneau, Alaska.

8. See Starr v. Hagglund, 374 P.2d 316, 319 (Alaska 1962); Annot., 70 A.L.R. 5, 39–41 (1931).

9. See State v. Peters, 112 Ohio St. 249, 147 N.E. 81, 83 (1924).

10. Committee Proposal No. 3, introduced by Committee on Direct Legislation and submitted to Convention with Committee's "Commentary" on the Article of Initiative, Referendum, and Recall, December 9, 1955.

11. Id.

12. Report of the Committee on Style and Drafting, Constitutional Convention Committee Proposal/3, Enrolled/Style and Drafting, January 23, 1956. See also Alaska Const., art. XI, § 1.

13. Supra, n. 10.

14. Committee Proposal No. 3 of December 19, 1955, and of January 6 and January 9, 1956. Some additional changes appear in the Committee Proposal No. 3, dated January 23, 1956, one of them providing that any question referred should be placed on the ballot for the first statewide election held more than 180 days after the adjournment of the session of the legislature which passed the act being referred.

section 6 that an act rejected by referendum is *void thirty days after certification.* That provision did not appear except in section 6 of the final draft of Proposal No. 3 which carries the date of January 23, 1956.

Finally, the respondents have called to our attention a document in the files and records of the constitutional convention entitled "Delegate Proposal No. 29, Initiative, Referendum and Recall—Amendment & Revision" dated December 1, 1955, and introduced by Delegate Metcalf. In the second paragraph of section 7 of that proposal it is provided that "any measure submitted to the vote of the people either by Initiative or Referendum shall take effect when approved by a majority of the votes cast thereon." Neither the two committees who worked on Proposal No. 3 nor the convention saw fit to include such a provision in article XI of our constitution.

Because of the foregoing substantial changes made in the wording of Proposal No. 3 after December 9, and in view of the failure of the Committee on Direct Legislation to specifically provide in article XI for the suspension of referred legislation pending a referendum election, along the lines proposed by Delegate Metcalf, we cannot say that the statement contained in the report of December 9, accompanying Proposal No. 3, is indicative of the considered intent of the constitutional convention that a referred act of the legislature should not take effect until after a referendum election thereon. The task then becomes ours to determine the meaning of article XI with respect to the problem at hand by construing the article as it is, taking into consideration all of its provisions and any other parts of the constitution in *pari materia.*[15]

We give attention first to sections 17 and 18 of article II of the constitution, which we deem essential to a true understanding of the referendum provisions of article XI. Those sections provide as follows:

> "Section 17. * * * A bill becomes law if, while the legislature is in session, the governor neither signs nor vetoes it within fifteen days, Sundays excepted, after its delivery to him. * * *"

> "Section 18. * * * Laws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date." [16]

[5] These two sections, we believe, give meaning to the words contained in section 6 of article XI that "an act rejected by referendum is void thirty days after certification." [17] If the act is not void until thirty days after certification that it was properly rejected at the poll, then we must assume that it was intended to be in full force and effect until the contrary has been established by the completed referendum process. This follows reasonably from the fact that the word "void" is defined as "ineffectual, having no legal force or binding effect," [18] for which the antithetical terms are "effectual, having legal force and binding effect."

15. Thomas v. State ex rel. Cobb, 58 So.2d 173, 174, 34 A.L.R.2d 140 (Fla.1952).

16. The respondents point out in their brief that under the provisions of sections 17 and 18 of article II acts of the legislature have the potentiality of becoming law and acquiring operative effect on a variety of dates before or after adjournment of the legislative session at which they were enacted. An act of the legislature with an immediate effective date, they rightly say, could conceivably be signed into law early in a legislative session and would be in actual operative effect for several months prior to the commencement of the ninety-day period in which a petition for referendum may be filed under article XI, section 5.

17. The legislature in 1960 adopted almost verbatim the language of section 6 of article XI of the constitution for establishing the time when an act rejected by referendum shall become void. SLA 1960, ch. 83, § 9.50 [AS 15.45.440].

18. Black, Law Dictionary 1745 (4th ed. 1951).

In the light of the clear wording of sections 17 and 18 of article II and section 6 of article XI set forth above, we believe that the framers of the constitution and the people who adopted it intended that the effectiveness of an act passed by the legislature should not be suspended during the period between its effective date and its rejection by the referendum. If they had intended otherwise they would have expressly so provided in the constitution.[19]

[6] We conclude that the natural import of the provisions of articles II and XI of the constitution, which we have discussed in this opinion, is that the filing of a referendum petition does not suspend the effect or operation of the act referred. Therefore, if an act is rejected by the people in a referendum election it, nevertheless, remains in full force and effect until thirty days after certification of the election returns by the secretary of state.

The order of the superior court denying the petitioners a preliminary injunction is sustained and the case is remanded to that court for further proceedings in conformity with this opinion.

19. Of the twenty other states which have provided in their constitutions for the use of the referendum by the electorate to reject laws passed by the legislature, Nevada seems to be the only one which has a provision declaring that, when the majority of the electors shall by their vote at a state election signify disapproval of the law referred, the law so referred shall be void and of no effect. After pointing out that there was nothing to be found in the referendum provision of the constitution expressly giving to the filing of a referendum petition the effect of suspending the operation of the law aimed at until a vote could be had upon the question, the Nevada Supreme Court held: "The people make their own Constitution, and, when they have not seen fit to provide that the filing of a referendum petition shall suspend the operation of a law, we are not authorized to read such a provision into the Constitution." State ex rel. Morton v. Howard, 49 Nev. 405, 248 P. 44, 45–46 (1926).

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439 P.2d 180, Oesau v. City of Dillingham, (Alaska 1968)

Donald OESAU, Lloyd O'Conner, Orville Braswell, Lyle Smith, and Marie Barry, Appellants,

v.

CITY OF DILLINGHAM, Appellee.

No. 856.
Supreme Court of Alaska.
April 1, 1968.

of approach upon which the adversary's experts rely.[35]

[6] In light of the above authorities and under the circumstances of this case where expert testimony will be required to establish the liability issues, we are of the opinion that a sufficient showing of good cause was made below. Good cause has been demonstrated in the need to eliminate surprise at trial, and the related need for full and effective cross-examination of opponents' expert witnesses.

We, therefore, conclude that reports of experts and experts themselves are within the ambit of our discovery rules. Adhering to the discovery principles which were articulated in *Miller*[36] and *Mathis*,[37] we believe that the ends of justice and the attainment of the objectives of our rules of discovery will be furthered by permitting the discovery of reports of experts as well as the taking of their pretrial depositions.

The superior court's order denying petitioner's Civil Rule 34 motion is reversed and the case remanded for further proceedings not inconsistent with the foregoing.

35. Professor Friedenthal writes:
> If availability of other experts were the sole criterion for prohibiting disclosure the need for expert testimony might often result in a race between litigants to employ the most prominent expert whose opinions obviously would carry much weight with a local jury. If the expert was favorable, so much the better; if not, he would be unavailable to the other side. * * *
>
> The situation is quite different when one party seeks the expert information solely to establish a foundation for cross-examination in the event the expert is called by his employer during trial. It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved. Unlike two eyewitnesses who disagree, two experts who disagree are not necessarily basing their testimony on their views of the same objective features. Instead they may rely on entirely separate data, since the theoretical bases underlying their respective approaches may differ radically. Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon. * * * He may need advice of his own experts to do so and indeed, in certain cases, his experts might require time to make further inspections and analyses of their own.

14 Stan.L.Rev. 455, 484–485 (1962) (footnotes omitted).

36. Miller v. Harpstef, 392 P.2d 21 (Alaska 1964).

37. Mathis v. Hilderbrand, 416 P.2d 8, 10 (Alaska 1966).

Donald OESAU, Lloyd O'Conner, Orville Braswell, Lyle Smith, and Marie Barry, Appellants,

v.

CITY OF DILLINGHAM, Appellee.

No. 856.

Supreme Court of Alaska.

April 1, 1968.

Action by second-class city to have fourth-class city declared dissolved and for other relief. The Superior Court, Third Judicial District, Hubert A. Gilbert, J., granted summary judgment to the second-class city, and the council members of the fourth-class city appealed. The Supreme Court, Dimond, J., held that where a fourth-class city was within the boundaries of a second-class city and the boundary commission's proposal to confirm boundaries of the second-class city and to dissolve the fourth-class city was not disapproved by the Legislature, the proposal became effective pursuant to constitutional provision and statutes relating to the boundary commission, and the fourth-class

city was dissolved though statutes providing specifically for dissolution of cities were not followed.

Affirmed.

1. Municipal Corporations ⇐51

Where fourth-class city was within boundaries of second-class city and boundary commission's proposal to confirm boundaries of second-class city and to dissolve fourth-class city was not disapproved by Legislature, proposal became effective pursuant to constitutional provision and statutes relating to boundary commission, and fourth-class city was dissolved though statutes providing specifically for dissolution of cities were not followed. AS 07.05.030, 29.10.543–29.10.549, 29.15.010–29.15.300, 29.25.010–29.25.510, 29.25.500, 29.80.010–29.80.050, 44.19.260(b) (1, 2), 44.19.340; Const. art. 10, §§ 7, 12; Laws 1965, c. 51.

2. Municipal Corporations ⇐24

Policy underlying constitutional provision for local boundary commission was that boundaries be established at state level. Const. art. 10, § 12.

James K. Tallman, Anchorage, for appellants.

David J. Pree and Robert C. Ely, of Ely, Guess, Rudd & Havelock, Anchorage, for appellee.

Before NESBETT, C. J., and DIMOND and RABINOWITZ, JJ.

OPINION

DIMOND, Justice.

Prior to 1963, the platted townsite of Dillingham, Alaska was not an incorporated municipality, but was a part of a larger area which had been incorporated as the Dillingham Public Utility District No. 1. In enacting legislation pertaining to borough government in Alaska, the legislature provided that special service districts, such as the Dillingham Public Utility District, would "continue to exercise their powers and functions under existing law until July 1, 1964."[1] Thus, the dissolution of the Dillingham Public Utility District No. 1 was foreordained.

In 1963 there were two separate moves to establish incorporated municipal government in Dillingham. On April 3, 1963, one group of persons filed a petition in the district court to incorporate as a fourth class city, to be known as Wood River, Alaska, all of the area of the Dillingham Public Utility District except the area encompassed by the platted townsite of Dillingham. Following a hearing and an election pursuant to statute[2] the district court on June 30, 1963 entered an order declaring that Wood River was incorporated as a city of the fourth class.

In the meantime, on April 24, 1963, another group of persons filed a petition in the superior court proposing incorporation as a second class city all of the area of the Dillingham Public Utility District No. 1. Following a hearing and an election pursuant to statute[3], the superior court entered an order on July 12, 1963 declaring Dillingham incorporated as a second class city. The boundaries of the city encompassed the entire area of the Dillingham Public Utility District No. 1, including the area covered by the fourth class city of Wood River which had been declared incorporated by the district court a few days earlier.

These two separate incorporations resulted in a boundary dispute between Wood River and Dillingham—Wood River claiming to be an incorporated city in its own right, and Dillingham claiming that its boundaries included Wood River. A report of this boundary dispute was made to the state local boundary commission by the Local Affairs Agency in August 1964. Following a hearing in Dillingham held

1. AS 07.05.030.
2. AS 29.25.010–29.25.510.
3. AS 29.15.010–29.15.300.

pursuant to law [4], the boundary commission issued a memorandum providing that if by January 1, 1965 the residents of the Dillingham-Wood River area had not taken positive steps toward the formation of an organized borough or a single city capable of meeting the area's needs and responsibilities in local government, the commission would propose a solution. Nothing was done by the residents of the area to solve the problem, and on February 2, 1965 the boundary commission, in accordance with law,[5] recommended to the legislature that the fourth class city of Wood River be dissolved, that the assets and liabilities of Wood River be transferred to the City of Dillingham, and that the boundaries of the City of Dillingham be defined so as to include the area of Wood River. The legislature did not disapprove of the commission's recommendation, and hence it became effective by virtue of the state constitution and statute.[6] In addition, during the 1965 legislative session where the boundary commission recommendation was presented, the legislature enacted a statute recognizing the dissolution of Wood River and the confirmation of the boundaries of the City of Dillingham pursuant to the commission's recommendation, and required that a special election be held for the offices of mayor and council constituting the governing body of the City of Dillingham.[7]

This action was commenced in May 1966 by the City of Dillingham against the members of the city council of Wood River to have Wood River declared to be dissolved and a nullity and to enjoin those persons purporting to act on behalf of the city of Wood River from so acting. Summary judgment was granted in favor of appellee, the court ordering as follows:

> ORDERED that there are no issues of fact in dispute between the parties to this action and that the law is clear that the City of Wood River, Alaska, incorporated as a city of the fourth class, July 30th, 1963, ceased to exist on April 9th, 1965 pursuant to "Recommendations for Local Boundary Changes Submitted to the Fourth State Legislature, First Session

4. AS 44.19.260(b) (1) provides:
   The local boundary commission may conduct meetings and hearings to consider local government boundary changes and other matters related to local government boundary changes, including extensions of services by incorporated cities into contiguous areas and matters related to extension of services * * *.

5. AS 44.19.260(b) (2) provides:
   The local boundary commission may present to the legislature during the first 10 days of a regular session proposed local government boundary changes, including gradual extension of services of incorporated cities into contiguous areas upon a majority approval of the voters of the contiguous area to be annexed and transition schedules providing for total assimilation of the contiguous area and its full participation in the affairs of the incorporated city within a period not to exceed five years.

6. Art. X, § 12 of the Constitution of the State of Alaska provides:
   Boundaries. A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.
   AS 44.19.340 provides:
   When boundary change takes effect. When a local government boundary change is proposed to the legislature during the first 10 days of any regular session, the change becomes effective 45 days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house.

7. SLA 1965, ch. 51.

Assembled: . . II" submitted February 2nd, 1965, which recommendations became law pursuant to Sections 44.19.260 AS and 44.19.340 AS, as confirmed by Chapter 51, Session Laws of Alaska, 1965; and,

IT IS FURTHER ORDERED that, following March 19th, 1965, and thereafter all the residents of the area described in the Order incorporating the second class City of Dillingham, whether or not they were included within the limits of the fourth class [city] of Wood River, owed to the government of the Second Class City of Dillingham, all of the obligations owed by other citizens of the City of Dillingham, including the obligation to pay real property assessments thereafter validly made and generally to be governed in all respects by the government of the Second Class City of Dillingham.

This appeal followed.

[1, 2] Article X, Section 7 of the Alaska Constitution provides that cities may be dissolved "in a manner prescibed by law." The legislature has provided for the dissolution of cities in AS 29.10.543–29.10.549, 29.25.500 and 29.80.010–29.80.050. These statutes generally provide for dissolution upon an election when the population of a city drops below a certain number, or upon a court order after a finding that a city has ceased to function as a city government. Since none of these methods was followed in the dissolution of the city of Wood River, appellants maintain that Wood River was not dissolved "in the manner provided by law", and therefore still exists as a municipal corporation in its own right.

The local boundary commission has the constitutional authority to "consider any proposed local government boundary change." It may present any such proposed change to the legislature, and the change becomes effective "forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house." [8]

In Fairview Public Utility District No. 1 v. City of Anchorage [9] we held that the authority vested in the local boundary commission by the Constitution was sufficient to effect, by means of a local government boundary change proposed by the commission, the annexation to the City of Anchorage of the Fairview Public Utility District No. 1, an area entirely surrounded by the city. The situation here is not dissimilar. The fourth class city of Wood River was encompassed within the boundaries of the second class City of Dillingham. Although the boundary commission's proposal was to confirm the boundaries of the City of Dillingham and to dissolve the city of Wood River, rather than to annex Wood River to Dillingham, the effect is the same. When the legislature failed to disapprove of the commission's proposal, the commission's local boundary change, which consisted of the abolition of the boundary of Wood River and the confirmation of the boundary of the City of Dillingham, had the effect of making Wood River a part of the City of Dillingham.

When the boundary commission's proposal for boundary change became effective, the city of Wood River was dissolved, even though the statutory procedures for dissolution of cities were not followed. The basic purpose for creating the boundary commission and conferring upon it the powers that it possesses was to obviate the type of situation that existed here where there was a controversy over municipal boundaries which apparently could not be settled at the local level. As we pointed out in the *Fairview* case, the concept that was in mind when the local boundary commission section of the Constitution was being considered by the constitutional convention was that local political decisions do not usually create proper boundaries and

8. Alaska Const. art. X, § 12.

9. 368 P.2d 540 (Alaska), appeal dismissed, 371 U.S. 5, 83 S.Ct. 39, 9 L.Ed.2d 49 (1962).

that boundaries should be established at the state level.[10] The purpose of the boundary change effected in this case by the boundary commission and the legislature was to establish boundaries at a state level, and resolve a conflict that could not be properly solved at the local level, by doing away with two separate governments in a single community and avoiding multiplication of facilities and services, duplication of tax burdens, and inevitable jurisdictional conflict and chaos. When the boundary change became effective, the city of Wood River was extinguished as a municipal corporation and its property, powers and duties were then vested in the City of Dillingham.[11]

The judgment is affirmed.

10. Fairview Pub.Util.Dist. No. 1 v. City of Anchorage, 368 P.2d 540, 543 (Alaska 1962).

11. Id. at 545.

489 P.2d 140, U.S. Smelting, Refining & Min. Co. v. Local Boundary Com'n, (Alaska 1971)

UNITED STATES SMELTING, REFINING AND MINING COMPANY, Appellant,

v.

LOCAL BOUNDARY COMMISSION, State of Alaska, and City of Nome, Appellees.

No. 1461.
Supreme Court of Alaska.
Sept. 29, 1971.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, Appellant,

v.

LOCAL BOUNDARY COMMISSION, State of Alaska, and City of Nome, Appellees.

No. 1461.

Supreme Court of Alaska.

Sept. 29, 1971.

Action by property owner for declaratory judgment decreeing proposed annexation of a large area including owner's property invalid. The Superior Court, First Judicial District, Thomas B. Stewart, J., dismissed action, and property owner appealed. The Supreme Court, Rabinowitz, J., held that under statute making it mandatory that boundary commission develop standards and procedures for changing local boundary lines prior to annexation proceedings, commission which failed to develop standards before conducting hearings prior to its submitting to legislature of a proposal concerning annexation lacked jurisdiction.

Reversed and remanded with directions.

1. Constitutional Law ⇐318

Under statute making it mandatory that boundary commission develop standards and procedures for changing local boundary lines prior to annexation proceedings, commission which failed to develop standards before conducting hearings prior to its submitting to legislature a proposal concerning annexation did not comply with requirements of substantive due process and lacked jurisdiction to recommend boundary change. A.S. 44.19.260(a).

2. Constitutional Law ⇐68(1)

Question whether local boundary commission followed statutory mandate that it develop standards for changing of local boundary lines prior to annexation was subject to judicial review notwithstanding general rule that all facets of annexation are political questions for exclusive legislative resolution. AS 44.19.260(a).

3. Municipal Corporations ⇐28

Property owner holding title to approximately 16 square miles of area involved in proposed annexation had standing to contest local boundary commission's recommendation of boundary change preparatory to proposed annexation.

William G. Ruddy, Robertson, Monagle, Eastaugh & Bradley, Juneau, for appellant.

Allan A. Engstrom and Gordon E. Evans, of Davidson, Engstrom & Evans, Juneau, for appellees.

Before BONEY, C. J., and DIMOND, RABINOWITZ, CONNOR and ERWIN, JJ.

RABINOWITZ, Justice.

In this appeal we are asked to decide numerous questions generated by the role the Local Boundary Commission played in the annexation by the city of Nome of United States Smelting's properties. We have determined that the superior court's order dismissing United States Smelting's action for declaratory judgment should be reversed with directions to enter a declaratory judgment decreeing the annexation in question to be invalid and of no effect.

Alaskan municipalities may gain territory in various ways. The city of Nome sought to do so through the Local Boundary Commission. Article X, section 12 of the Alaska Constitution provides:

> A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution con-

curred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

By statute it is provided that the commission must make studies of local government boundary problems, develop proposed standards and procedures for changing boundaries, and consider boundary changes requested of it by political subdivisions.[1] The commission may conduct hearings on boundary changes and present proposed changes to the legislature.[2] The change becomes effective unless the legislature disapproves; legislative silence permits the change.[3]

In the lower court United States Smelting instituted an action against the Local Boundary commission and the city of Nome for a declaratory judgment. The complaint stated that the commission had recommended annexation of a large area including United States Smelting property to the city of Nome, and that the legislature had not disapproved the recommendation. By way of relief, United States Smelting asked the superior court to declare the annexation invalid. United States Smelting moved for summary judgment and the city of Nome moved for dismissal. United States Smelting's motion was denied, and the city of Nome's motion was granted. United States Smelting now appeals from the dismissal of its declaratory judgment action by the superior court.

In this appeal, United States Smelting advances three specifications of error. It is contended that the commission took United States Smelting property without substantive due process, without procedural due process, and without just compensation. Appellees city of Nome and the commission, besides countering these arguments, contend that United States Smelting lacks standing, and that annexation is a political question outside this court's jurisdiction to review.

[1] As part of its due process argument, United States Smelting contends that the failure of the commission to promulgate standards for boundary changes vitiated the annexation of its properties. AS 44.19.260(a) lists four functions the commission "shall" perform. These are:

(1) make studies of local government boundary problems;

(2) develop proposed standards and procedures for changing local boundary lines;

(3) consider a local government boundary change requested of it by the legislature, the director of local affairs, or a political subdivision of the state; and

(4) develop standards and procedures for the extension of services and ordinances of incorporated cities into contiguous areas for limited purposes * * *.[4]

AS 44.19.260(b) additionally lists two functions that the commission "may" perform. The two functions are:

(1) conduct meetings and hearings to consider local government boundary changes and other matters related to local government boundary changes, including extensions of services by incorporated cities into contiguous areas and matters related to extension of services; and

(2) present to the legislature during the first 10 days of a regular session proposed local government boundary changes * * *.

We think it clear from the overall structure of AS 44.19.260 that the duties imposed upon the commission in subsection

1. AS 44.19.260(a).
2. AS 44.19.260(b).
3. AS 44.19.340.
4. Alaska Const. art. X § 12 states in part that the commission "subject to law, may establish procedures whereby boundaries may be adjusted by local action." Since the annexation at issue was not "by local action," but by commission action and legislative silence, this constitutional provision has no applicability to the issues in this appeal.

(a) are mandatory, and those in subsection (b) discretionary.[5] We are of the further opinion that the language employed by the legislature made the exercise of the commission's discretion under AS 44.19.260(b) conditioned upon the development of standards and procedures for changing local boundary lines under AS 44.19.260(a) (2). In short, we hold that before the commission could have conducted any effective meetings, or hearings, and prior to its submitting to the legislature a valid proposal concerning the Nome annexation, it was obligated to comply with the requirement of AS 44.19.260(a) (2) that it develop standards for changing local boundary lines.

The grammar and nature of some clauses of AS 44.19.260(a) suggest commission action over a considerable period of time. The duty to "make studies," under subsection (a) (1), would seem to indicate such studies as are necessary during the life of the agency. Arguably, the duty to develop standards for changing local boundary lines under AS 44.19.260(a) (2) is of the same sort. It means, under such a reading, that as the commission learns from experience and finds standards necessary, it should develop them over its life. We do not find such a construction very persuasive however. The duty under AS 44.19.-260(a) (3) to consider requested boundary changes implies a reasonable time limitation. This reasonable time limitation leads to the conclusion that not all of subsection (a) can be characterized as comprehending continuing duties and not conditions.

In our view the Local Boundary Commission has had sufficient time to discover sensible principles pertaining to the changing of local boundaries. Permitting continued failure on the commission's part to promulgate standards for changing local boundary lines can no longer be justified by the need for further experience.[6] Since under AS 44.19.260(a) the legislature required the commission to develop standards in order to recommend boundary changes, and the commission had not developed standards prior to the Nome annexation proceedings, we hold that the commission lacked the power to recommend the Nome boundary changes in question.[7] To do otherwise would be to condone the commission's nonobservance of a valid legislative prerequisite to the exercise of the commission's discretion in matters of local boundary changes.

Our holding necessarily embodies the rejection of the city of Nome's and the commission's argument that an aggrieved property owner in an area to be annexed lacks standing to contest the annexation and that all facets of annexation are political questions for exclusive legislative resolution. We turn first to the political question contention and the subject of judicial review of annexation questions in general.

[2] In Alyeska Ski Corporation v. Holdsworth, 426 P.2d 1006, 1012 (Alaska 1967), this court was faced with a situation where there was no express statutory provision providing for judicial review of the administrative action in question. In that case, we concluded that it was not intended that this court was to be stripped of its constitutional obligation to insure that the administrative decision was in conformity with our laws. More recently in K & L Distributors, Inc. v. Murkowski, 486 P.2d 351, 354 (Alaska 1971), we had occasion to

5. *See generally* 2 F. Horack, Sutherland on Statutory Construction § 2803 (3rd ed. 1943) and 3 F. Horack, Sutherland on Statutory Construction §§ 5808, 5811, 5821 (3rd ed. 1943).

6. SLA 1959, ch. 64, § 7 provided in part that "The Local Boundary Commission is hereby vested with the duties, powers, and responsibilities involved in * * * developing proposed standards and procedures for changing local boundary lines * * *." It was not until the enactment of ch. 55, SLA 1964 that AS 44.19.260(a) and (b) were structured substantially in their present form which makes the development of standards a precondition to the commission's exercise of its discretion under subsection (b).

7. It appears that the commission has developed procedures for changing local boundary lines. In 6 Alaska Adm.Code §§ 2000–07, the commission has stated detailed procedural rules for boundary change proceedings.

decide whether the commissioner of Economic Development's grant of an industrial incentive tax credit was subject to judicial review in the face of a statute which provided that "All decisions and findings of the [Commissioner] * * * are final and no judicial or administrative appeal or other proceeding lies against them * * *." In *Murkowski*, we said that Alyeska Ski Corporation v. Holdsworth indicated strong policy reasons favoring judicial review of administrative action. We went on to say in *Murkowski* that:

> It is the constitutionally vested duty of this court to assure that administrative action complies with the laws of Alaska. We would not be able to carry out this duty to protect the citizens of this state in the exercise of their rights if we were unable to review the actions of administrative agencies simply because the legislature chose to exempt their decisions from judicial review. The legislative statement of finality is one which we will honor to the extent that it accords with constitutional guarantees. But if the administrative action is questioned as violating, for example, the due process clause, we will not hesitate to review the propriety of the action to the extent that constitutional standards may require.[8]

Of particular importance to the issues in this appeal is *Murkowski's* statement of the scope of judicial review of an administrative decision in order to assure compliance "with due process under Alaska law."[9] In this regard, the proper limits of judicial review were formulated in the following manner:

> The safeguard which due process assures is not that a court may examine each factual finding to see that it is correct, or even that it is supported by substantial evidence. Rather, we will review to assure that the trier of fact was an impartial tribunal, that no findings were made except on due notice and opportunity to be heard, that the procedure at the hearing was consistent with a fair trial, and that the hearing was conducted in such a way that there is an opportunity for a court to ascertain whether the applicable rules of law and procedure were observed.[10]

Thus, even in light of purported administrative finality *Murkowski* permits judicial review of an administrative decision to ascertain whether the "applicable rules of law and procedure were observed." This test delineates the contours of judicial review employed by us in the case at bar in reaching the conclusion that the Local Boundary Commission failed to comply with the mandate of AS 44.19.260(a) that it develop standards for the changing of the local boundary lines. Without doubt there are questions of public policy to be determined in annexation proceedings which are beyond the province of the court. Examples are the desirability of annexation, as expressed in published standards. Judicial techniques are not well adapted to resolving these questions. In that sense, these may be described as political questions," beyond the compass of judicial review. But other annexation issues, such as whether statutory notice requirements were followed, are readily decided by traditional judicial techniques. *Murkowski* clearly permits this latter type of review.

Our decision as to the availability of judicial review of the Local Boundary Commission's action in this case is reflective of our determination that it is administrative action, rather than legislative action which we have been called upon to review. We thus find unpersuasive the argument that article X, section 12 of the Alaska Constitution and AS 44.19.340[11] make the decision as to whether the commission has complied with the law exclusively legislative. We

8. K & L Distributors, Inc. v. Murkowski, 486 P.2d 351, 357 (Alaska 1971) (footnote omitted).

9. *Id.*

10. Id. at 357. (footnote omitted)

11. This statute reads as follows:
When a local government boundary change is proposed to the legislature during the first 10 days of any regular session, the change becomes effective 45 days after presentation or at the end of

think such a construction would be contrary to our decisions in *Alyeska* and *Murkowski* and reads too much into legislative silence. For the constitution empowers the legislature to veto commission actions, but does nothing to compel the legislature to review for compliance with its own requirements. The *Alyeska* and *Murkowski* cases stress the point that under Alaska's Constitution this court has the duty of insuring that administrative action complies with the laws of Alaska. Absent known standards governing the changing of local boundary lines, the legislature's ability to make rational decisions as to whether to approve or disapprove proposed local boundary changes of the commission is seriously handicapped.

[3] This brings us to the question of whether or not an aggrieved property owner in an area to be annexed has standing to contest the annexation.[12] We think this question must be answered in the affirmative because persons, or entities, in United States Smelting's position are precisely the ones who are injured by improper annexation. This conclusion is in accord with our decision in K & L Distributors, Inc. v. Murkowski.[13] There competing wholesale distributors of malt liquor in Alaska filed a complaint seeking judicial review of the Commissioner of Economic Development's grant of an industrial incentive tax credit to the Oetker Brewing Company. The commissioner and Oetker Brewing argued that the mere fact that the malt distributors were competitors did not endow them with standing to contest the commissioner's decision. While acknowledging that traditional doctrine would deny the wholesale malt distributors standing based solely on their competitive position, we held that the distributors did have standing. In reaching this conclusion we said in part that:

> In this case the question of the ability of the state to grant an industrial incentive tax credit is of substantial importance * * *. No one has a greater interest in the outcome of the request for exemption than appellants [the wholesale malt distributors], and if they cannot raise the issue, it is unlikely that the issue will be raised.[14]

In the case at bar, United States Smelting owns approximately 16 square miles of the area involved in the annexation by the city of Nome. In light of this fact and our decision in *Murkowski*, we hold that United States Smelting has standing to seek judicial review of the Local Boundary Commission's actions in the Nome annexation proceedings.

We therefore conclude that the superior court's judgment of dismissal should be reversed and the cause remanded with directions to enter a declaratory judgment decreeing the annexation to be invalid and of no effect.[15]

the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house.

12. Fairview Pub. Util. Dist. No. 1 v. City of Anchorage, 368 P.2d 540 (Alaska 1962), and Oesau v. City of Dillingham, 439 P.2d 180 (Alaska 1968), involved boundary change issues. In neither case did we decide the standing and political question doctrines which are advanced in this appeal.

13. K & L Distributors, Inc. v. Murkowski, 486 P.2d 351 (Alaska 1971). *Compare* Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006, 1015 (Alaska 1967). There we held that an aggrieved bidder had standing to seek judicial review of a decision of the Commissioner of Natural Resources "so that the public interest, in adherence to law in the disposal and leasing of state owned lands, may be vindicated." (footnote omitted).

14. K & L Distributors, Inc. v. Murkowski, 486 P.2d 351, 354 (Alaska 1971) (footnote omitted).

15. Existing cities with Local Boundary Commission created boundaries remain unaffected by our holding in this case under the *de facto* municipality doctrine. Rothkopf v. City of Danbury, 156 Conn. 347, 242 A.2d 771 (1968); C. Tooke, De Facto Municipal Corporations. Under Unconstitutional Statutes, 37 Yale L.J. 935 (1928).

Our disposition makes unnecessary resolution of any other question which was presented in this appeal.

518 P.2d 92, Mobil Oil Corp. v. Local Boundary Commission, (Alaska 1974)

MOBIL OIL CORPORATION et al., Appellants,

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knowingly waives the same." [21] A comparable procedure should be followed in post-conviction proceedings. The advantages of legal representation should be explained to the prisoner in some detail, and in the event of an evidentiary hearing at which the prisoner is present he should be given the option of having legal counsel available for consultation. Indeed, where the court is not completely satisfied that the prisoner is capable of *pro se* representation, it is within its sound discretion to insist that the prisoner accept consultative assistance by appointed counsel. Finally, the trial judge should determine that the prisoner is willing to conduct himself with at least a modicum of courtroom decorum.[22]

[6] In addition, as a precondition to self-representation at an evidentiary hearing, the hearing judge must already have determined that the prisoner's personal presence at the evidentiary hearing is necessary pursuant to the discretionary authority vested in him under Criminal Rule 35(h). Were we not to impose this qualification upon the right of self-representation, this decision could well afford the means by which the hearing judge's discretionary power to refuse to order the production of the prisoner at a post-conviction evidentiary hearing could be circumvented. Such a limitation is implicit in the right "retained by the people" to appear at a post-conviction hearing *in propria persona*, for the federal courts have always possessed the power to refuse to compel the production of a prisoner at an evidentiary hearing on the prisoner's petition for post-conviction relief when his physical presence was not necessary.[23] Consequently, a comparable restriction must be presumed to inhere in the retained right of *pro se* representation.

[7] In the case at bar, we note that the pleadings filed by McCracken demonstrate a certain knowledge of the merits of his allegations, and indicate at least to some extent that he may have the ability to represent himself. In the absence of an opportunity on our part to more fully question McCracken, his rights may best be vindicated by an order permitting him to represent himself with the assistance of counsel from the Public Defender's Office appointed by the court. If it is determined that McCracken's presence will be necessary at a hearing, a more thorough inquiry into the propriety of permitting him to represent himself can be undertaken at that time.

The order denying McCracken's motion for substitution of counsel is reversed in part, and the case is remanded to the trial court for further proceedings in accordance with this opinion.

Reversed in part and remanded.

21. *Cf.* People v. Floyd, 1 Cal.3d 694, 83 Cal. Rptr. 608, 464 P.2d 64, 68 (1970); Note, The Right of an Accused to Proceed Without Counsel, 49 Minn.L.R. 1133, 1141–45 (1965).

22. However, the hearing judge must bear in mind that prisoners are not experienced trial lawyers, and are not practiced in the formalities of courtroom etiquette.

23. 28 U.S.C. § 2255; *see* Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962); Hayman v. United States, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1952).

MOBIL OIL CORPORATION et al., Appellants,

v.

LOCAL BOUNDARY COMMISSION of the State of Alaska et al., Appellees.

No. 1947.

Supreme Court of Alaska.

Jan. 16, 1974.

Corporations and individuals holding surface leases and owners of interests in oil and gas wells and other property in the area of Prudhoe Bay petitioned for declar-

atory judgment against local boundary commission, the lieutenant governor and state holding incorporation of North Slope Borough invalid. The Superior Court, Third Judicial District, Eben H. Lewis, J., upheld acceptance of the petition for incorporation and plaintiffs appealed. The Supreme Court, Erwin, J., held that the geography standard was satisfied even though borough boundaries encompassed naval petroleum reserve No. 4, in view of the reserves importance to the subsistent life style of area residents; that the availability of travel by charter air craft and surface transportation limited to dog teams and snow machines satisfied the transportation requirements; that inclusion of plaintiffs' property at Prudhoe Bay within the borough did not deny substantive due process; that local boundary commission was not required to submit the incorporation petition to the legislature; and that award of $20,000 attorney fees to the prevailing parties was not improper inasmuch as Superior Court could have concluded that plaintiffs were acting in their private interests and not in behalf of the public.

Affirmed.

Boochever, J., did not participate.

1. Municipal Corporations ⇐12(7)

Statute permitting judicial review of local boundary commission's acceptance of an incorporation petition in manner and within scope of review prescribed by the Administrative Procedure Act does not, read together with statute prescribing that decision shall contain findings of fact, create an obligation on the part of the local boundary commission to make findings of fact. AS 44.62.510, 44.62.560, 44.62.570.

2. Administrative Law and Procedure ⇐485

In the usual case findings of fact by an administrative agency would be required even in the absence of a statutory duty in order to facilitate judicial review, insure careful administrative deliberation, assist the parties in preparing for review, and restrain agencies within the bounds of their jurisdiction. AS 44.62.010 et seq.

3. Municipal Corporations ⇐12(12)

The superior court, in reviewing decision of local boundary commission accepting petition for incorporation of first class organized borough, did not accord undue deference to the commission when it declined to undertake independent interpretation of the standards for incorporation. AS 07.10.030.

4. Administrative Law and Procedure ⇐790

Where administrative action involves formulation of a fundamental policy, the appropriate standard on review is whether the agency action has a reasonable basis. AS 44.62.010 et seq.

5. Municipal Corporations ⇐12(1)

The statutory standards for incorporation of a borough were intended to be flexibly applied to a wide range of regional conditions. AS 07.10.030.

6. Municipal Corporations ⇐12(12)

Local boundary commission's acceptance of petition for incorporation of first class organized borough should be affirmed if reviewing court sees in the record a reasonable basis of support for the commission's reading of the standards and its evaluation of the evidence. AS 07.10.030.

7. Municipal Corporations ⇐13

Statement of purpose accompanying the local government article of the Alaska Constitution favors upholding organization of boroughs by the local boundary commission whenever the requirements for incorporation have been minimally met. Const. art. 10, § 1.

8. United States ⇐3

State has been granted concurrent jurisdiction over naval petroleum reserve No. 4 until Congress enacts legislation to the contrary. AS 07.10.030(2); Alaska Statehood Act, 48 U.S.C.A. preceding section 21.

9. Municipal Corporations ⇐7

Incorporation of North Slope Borough met the geography standard notwithstanding inclusion of naval petroleum reserve No. 4 in view of showing of the reserve's importance to the subsistence life style of

area residents. AS 07.10.030(2); Alaska Statehood Act, 48 U.S.C.A. preceding section 21.

10. Municipal Corporations ⇐6

Incorporation of North Slope Borough reasonably met the transportation requirement even though surface transportation was limited to dog teams and snow machines. AS 07.10.030(4).

11. Constitutional Law ⇐253(2)

Test of substantive due process is whether the action of the legislature must be said to be arbitrary.

12. Constitutional Law ⇐251

Judicial concern for whether a statute comports with substantive due process goes no farther than a perception that the act furthers a legitimate governmental purpose; the question of benefit is not irrelevant, but it is only a part of the more general inquiry into arbitrariness.

13. Constitutional Law ⇐278(2)
Municipal Corporations ⇐4

Incorporation of North Slope Borough did not deny due process to corporations and individuals holding surface leases and owners of interests in oil and gas wells and other property in the area of Purdhoe Bay notwithstanding the uncontested ability of the property owners to supply many of the services which the North Slope Borough was empowered to provide. AS 07.-10.060–07.10.090, 44.19.250; Const. art. 10, § 12.

14. Municipal Corporations ⇐12(12)

Judicial review of administrative actions by local boundary commission and local affairs agency in accepting petition for incorporation of borough does not reach whether incorporation is desirable. AS 07.10.060–07.10.90, 44.19.250; Const. art. 10, § 12.

15. Municipal Corporations ⇐12(12)

In view of legislature's delegation of power of incorporation to the local boundary commission without reserving any power of review, the commission's decision accepting incorporation petition need not be submitted to the legislature, and constitutional provision that commission may present proposed boundary changes to the legislature did not require boundary commission to submit the accepted incorporation petition to the legislature. Const. art. 10, §§ 3, 12; AS 29.03.010.

16. Municipal Corporations ⇐28

Creation of organized borough from nonfunctioning organized borough cannot be equated with boundary changes contemplated by section of Constitution providing that local boundary commission may present proposed changes to the legislature. Const. art. 10, §§ 3, 12; AS 07.10.120(f).

17. Appeal and Error ⇐984(5)

Award of attorney fees to the prevailing party will not be set aside absent an abuse of discretion. Rules of Civil Procedure, rule 82(a).

18. Costs ⇐172

Award of $20,000 attorney fees to the prevailing parties in unsuccessful action by property owners against local boundary commission, lieutenant governor and state to have incorporation of North Slope Borough held invalid was not an abuse of discretion inasmuch as superior court could have concluded that property owners were acting in their private interests and not in behalf of the public. Rules of Civil Procedure, rule 82(a).

H. Russel Holland, Holland & Thornton, Joseph Rudd, Ely, Guess & Rudd, Anchorage, John Lansdale, Jr., Squire, Sanders & Dempsey, Cleveland, Ohio, for appellants.

John E. Havelock, Atty. Gen., Juneau, John A. Reeder, Jr., Asst. Atty. Gen., Charles K. Cranston, Anchorage, David H. Getches, Native American Rights Fund, Boulder, Colo., John W. Hendrickson, Anchorage, for appellees.

Before RABINOWITZ, Chief Justice, CONNOR, ERWIN and FITZGERALD, Justices, and BURKE, Superior Court Judge.

OPINION

ERWIN, Justice.

This appeal challenges administrative actions by the Local Boundary Commission and the Local Affairs Agency [1] in connection with incorporation of the North Slope Borough.

On April 6, 1971, a petition for incorporation of a first class organized borough was submitted to the Local Affairs Agency by the Arctic Slope Native Association.[2] The petition proposed creation of a North Slope Borough reaching from the Bering Straits below Point Hope eastward to the Canadian border and from the Brooks Range north to the Arctic shore. Within these 87,500 square miles lie the cities of Barrow, Point Hope, Wainwright, Kaktovik and Anaktuvuk Pass, a total population of less than four thousand, and the oil fields and associated development camps near Prudhoe Bay.

Upon receipt of the petition and pursuant to its duties under AS 07.10.060–.090,[3] the Local Affairs Agency reviewed the petition for proper form and number of signatures [4] and undertook an investigation of its compliance with certain standards for incorporation, composition and apportionment of the borough assembly, and areawide powers set out in AS 07.10.030.-050. The agency submitted a report on its inquiries to the Local Boundary Commission.

The Commission, pursuant to AS 07.10.-100–.110,[5] commenced an additional investi-

1. The Local Boundary Commission is a body mandated by the constitution and made a part of the Local Affairs Agency by statute. Alaska Const. art. X, § 12; AS 44.19.250. The Local Affairs Agency is now designated as the Department of Community and Regional Affairs. Ch. 200, § 9, SLA 1972.

2. Forty-one per cent of the qualified voters of the proposed borough had signed the petition.

3. These statutes provided:
07.10.060. *Review by Local Affairs Agency.* Upon receipt of a petition, the Local Affairs Agency shall immediately proceed with a review of it to determine (1) if the petition is substantially in the proper form and (2) if the petition is signed by the required number of qualified voters.
07.10.070. *Return of petition.* If the Local Affairs Agency determines that the petition is not substantially in the proper form or lacks the minimum number of qualified voters signing the petition, the agency shall not accept the petition but may return it for correction or completion.
07.10.080. *Investigation.* (a) If the Local Affairs Agency determines that the petition is substantially in the proper form and contains the required number of qualified voters' signatures, the agency shall conduct an investigation to determine (1) if the proposed incorporation of the borough, (2) if the proposed composition and apportionment of the borough assembly, and (3) if the proposed assignment of areawide powers meet the standards prescribed by this Act. In investigating the proposed apportionment of the borough assembly, the agency shall use the latest figures of the United States Bureau of the Census. However, if these figures are considered inadequate by the agency because of recent population changes or other limitations in the use of these figures, the agency may use any method necessary to determine most accurately the actual population.
(b) The Local Affairs Agency may combine petitions for incorporation from the same general area whether all or part of the same area is included in the petitions. Petitions shall be investigated in the order deemed advisable by the Local Affairs Agency, and not necessarily in the order received.
07.10.090. *Report to the Local Boundary Commission.* The Local Affairs Agency shall report the findings of its investigation to the Local Boundary Commission together with any recommendations it may have regarding the incorporation of the proposed organized borough, the composition and apportionment of the assembly, and the assignment of areawide powers.
Title 7 was repealed by ch. 118, SLA 1972 in favor of the new Title 29, effective September 10, 1972. Section 3 of the repealer preserved existing rights and duties allowing this appeal to be decided under Title 7.

4. AS 07.10.020.

5. These statutes provided:
07.10.100. *Hearing by Local Boundary Commission.* The Local Boundary Commission shall hold at least one hearing in the area to be incorporated as an organized borough for the purpose of hearing public comment on the proposal for the incorporation of the organized borough, the composition and apportionment of the borough as-

gation. A mandatory hearing was held at Barrow on December 2, 1971, to elicit public comment. On February 23, 24 and 25, 1972, the Commission held a public meeting in Anchorage, heard additional comment, and accepted the petition.[6] This was noticed to the Lieutenant Governor in a document dated February 25, 1972. And on March 28, 1972, a group of eleven corporations and individuals filed the petition for judicial review which has led to this appeal.[7]

These corporations and individuals are holders of surface leases and owners of interests in oil and gas wells and other real and personal property in the area of Prudhoe Bay. In the superior court, they sought a declaratory judgment against the Local Boundary Commission, the Lieutenant Governor and the state holding the incorporation invalid. The five incorporated cities within the borough, two residents of the area, the Arctic Slope Native Association and the North Slope Borough were permitted to intervene as defendants. After motions for summary judgment by all parties were denied, the superior court upheld acceptance of the petition, finding, ***inter alia,*** that the investigations of the Local Affairs Agency and the Local Boundary Commission were consistent with procedural due process, that inclusion of the plaintiffs' property within the borough did not deny substantive due process, and that the evidence assembled gave substantial ssupport to the Commission's action. The defendants were awarded $20,000.00 attorneys' fees. From the judgment affirming the Commission and the order awarding attorneys' fees, all plaintiffs below appeal.

The property owners challenge the procedures of the administrative agencies, the scope of review applied by the superior court and the adequacy of the evidence supporting organization of the North Slope Borough. They raise the following arguments: (1) the Local Boundary Commission did not produce required findings of fact; (2) the superior court should not have deferred to the Commission's interpretation of the statutory criteria for incorporation; {3) acceptance of the borough petition was not supported by substantial evidence; {4) inclusion of the plaintiffs' property within the borough denied them substantive due process; (5) the accepted incorporation petition should have been submitted to the legislature; and {6) attorneys' fees should not have been awarded to the prevailing parties.

I. FINDINGS OF FACT

[1] AS 07.10.110 permits judicial review of the Commission's acceptance of an

sembly, the assignment of areawide powers, and the location of borough boundaries. 07.10.110. Determination by Local Boundary Commission. After considering the findings of the Local Affairs Agency and the comments at the public hearing, the Local Boundary Commission shall determine if the petition is to be accepted. If the commission determines that the proposed organized borough fails to meet the standards for incorporation or the composition and apportionment of the assembly prescribed by this Act, the commission shall reject the petition. If the commission determines that the proposed organized borough meets the standards for incorporation and the composition and apportionment of the assembly prescribed by this Act, the commission shall accept the petition. If the Local Boundary Commission determines that the proposed organized borough would meet the standards prescribed by this Act, if changes were made in the composition and apportionment of the borough assembly, the boundaries of the proposed borough, or the areawide powers to be exercised by the proposed borough, the commission may change the boundaries of the proposed organized borough or the composition and apportionment of the borough assembly or the areawide powers of the proposed organized borough and accept the petition. Any person aggrieved by any determination of the Commission may appeal to the Superior Court in the manner and within the scope of review prescribed by Sections 24 and 25, Ch. 2, of the Administrative Procedure Act (AS 44.62).

6. The Commission, exercising its authority under AS 07.10.110, granted the borough only the mandatory areawide powers of education, land use planning and taxation.

7. Review by the superior court was authorized by AS 07.10.110.

incorporation petition "in the manner and within the scope of review prescribed by Sections 24 and 25, Ch. 2, of the Administrative Procedure Act (AS 44.62)." We do not accept appellants' contention that this language, read together with AS 44.62.510,[8] creates an obligation on the part of the Local Boundary Commission to make findings of fact. The sections of the Administrative Procedure Act invoked are 44.62.560–44.62.570[9] which prescribe the manner and scope of judicial review but do not address the form of the agency's determinations. The latter was set out in AS 07.10.110 without imposition of a duty to produce findings. If these were to be required by the Administrative Procedure Act, the obligation could be expected to have been imposed in the same manner as it has been placed upon other agencies; that is, by listing the Local Boundary Commission among the administrative bodies subjected by AS 44.62.330(a) to certain procedural requirements, including the duty in AS 44.62.510 to prepare written findings of fact, or by expressly imposing such a duty in a statute relating to the Commission.[10] The Local Boundary Commission is not named, nor does any part of Title 7 require findings. Given this framework, we find no statutory command that findings of fact accompany acceptance of a petition for borough incorporation.

[2] The special function of the Commission, to undertake a broad inquiry into the desirability of creating a political subdivision of the state, makes us reluctant to impose an independent judicial requirement that findings be prepared.[11] From our own review of the entire record of this controversy, we have been able to determine the basis of the Commission's decision,[12] and we have concluded that its proceedings and review by the superior court have been consistent with sound principles of administrative law.

II. SCOPE OF REVIEW

[3–6] Appellants attack the scope of the superior court's review of the Commis-

8. The statute provides in part:
(a) A decision shall be written and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference to them. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

9. AS 44.62.570 provides in part:
(a) An appeal shall be heard by the superior court sitting without a jury.
(b) Inquiry in an appeal extends to the following questions: (1) whether the agency has proceeded without, or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
(c) The court may exercise its independent judgment on the evidence. If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence, or (2) substantial evidence in the light of the whole record.
(d) The court may augment the agency record in whole or in part, or hold a hearing de novo. If the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing, the court may (1) enter judgment as provided in (e) of this section and remand the case to be reconsidered in the light of that evidence; or (2) admit the evidence at the appellate hearing without remanding the case.
We have have previously held that in areas of agency expertise or fundamental policy formulation the proper standard on review is whether the agency action has a reasonable basis. *E. g.*, Swindel v. Kelly, 499 P.2d 291, 298 (Alaska 1972). The standard appropriate for this appeal is discussed at Part II, *infra*.

10. AS 44.62.330(b).

11. We recognize that in the usual case findings of fact would be required even in the absence of a statutory duty in order to facilitate judicial review, insure careful administrative deliberation, assist the parties in preparing for review, and restrain agencies within the bounds of their jurisdiction. See 2 K. Davis, Administrative Law Treatise § 1605 at 446–48 (1958).

12. *Cf.* K & L Distributors, Inc. v. Murkowski, 486 P.2d 351, 359–360 (Alaska 1971).

sion's action, contending that the court accorded undue deference to the Commission when it declined to undertake independent interpretation of the standards for incorporation.[13] We disagree. Recent cases have established that where administrative action involves formulation of fundamental policy, the appropriate standard on review is whether the agency action has a reasonable basis. Swindel v. Kelly, 499 P. 2d 291, 298 (Alaska 1972); Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971); Pan American Petroleum Corporation v. Shell Oil Company, 455 P.2d 12, 21–23 (Alaska 1969). A determination whether an area is cohesive and prosperous enough for local self-government involves broad judgments of political and social policy. The standards for incorporation set out in AS 07.10.030 were intended to be flexibly applied to a wide range of regional conditions. This is evident from such terms as "large enough", "stable enough", "conform generally", "all areas necessary and proper", "necessary or desirable", "adequate level" and the like. The borough concept was incorporated into our constitution in the belief that one unit of local government could be successfully adapted to both urban and sparsely populated areas of Alaska,[14] and the Local Boundary Commis-

13. Criteria for incorporating an organized borough were set forth in AS 07.10.030 which provided:

Standards for incorporation. No area may be incorporated as an organized borough unless it conforms to the following standards.

(1) The population of the area proposed for incorporation shall be interrelated and integrated as to its social, cultural, and economic activities. The population shall be qualified and willing to assume the duties arising out of incorporation, shall have a clear understanding of the nature of the undertaking for which they ask, and shall be large enough and stable enough to warrant and support the operation of organized borough government.

(2) The boundaries of the proposed organized borough shall conform generally to the natural geography of the area proposed for incorporation, shall include all areas necessary and proper for the full development of integrated local government services, but shall exclude all areas such as military reservations, glaciers, icecaps, and uninhabited and unused lands unless such areas are necessary or desirable for integrated local government.

(3) The economy of the proposed organized borough shall encompass a trading area with the human and financial resources capable of providing an adequate level of governmental services. In determining the sufficiency and stability of an area's economy, land use, property valuations, total economic base, total personal income, present and potential resource or commercial development, anticipated functions, expenses, and income of the proposed organized borough, shall be considered.

(4) The transportation facilities in the area proposed for incorporation shall be of such a unified nature as to facilitate the communication and exchange necessary for the development of integrated local government and a community of interests. Means of transportation may include surface (both water and land) and air. Areas which are accessible to other parts of a proposed organized borough by water or air only may not be included within the organized borough unless access to them is reasonably inexpensive, readily available, and reasonably safe. In considering the sufficiency of means of transportation within a proposed organized borough, existing and planned roads and highways, air transport and landing facilities, boats and ferry systems, and railroads, shall be included.

Only satisfaction of paragraph (2), the geography standard, and (4), the transportation standard, are at issue in this appeal.

14. A summary by the local government committee at the constitutional convention of the principles underlying the borough concept is preserved in T. Morehouse & V. Fischer, Borough Government in Alaska at 63–64 (1971). This relates:

Self-government—The proposed article bridges the gap now existing in many parts of Alaska. It opens the way to democratic self-government for people now ruled directly from the capital of the territory or even Washington, D.C. The proposed article allows some degree of self-determination in local affairs whether in urban or sparsely populated areas. . . .

. . . . . .

Flexibility—The proposed article provides a local government framework adaptable to different areas of the state as well as to changes that occur with the passage of time. . . .

The authors describe how evolution of the borough has reflected this intended flexibility.

[T]wo recognizable types of organized boroughs now exist in Alaska: the *regional*

sion has been given a broad power to decide in the unique circumstances presented by each petition whether borough government is appropriate. Necessarily, this is an exercise of delegated legislative authority to reach basic policy decisions. Accordingly, acceptance of the incorporation petition should be affirmed if we perceive in the record a reasonable basis of support for the Commission's reading of the standards and its evaluation of the evidence.

[7] The appellants argue that neither the geography nor the transportation standard is satisfied by the record evidence. Our review of the record has been undertaken in light of the statement of purpose accompanying article X, the local government article, of the Alaska constitution. Section 1 declares in part:

> The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. . . .

We read this to favor upholding organization of boroughs by the Local Boundary Commission whenever the requirements for incorporation have been minimally met.

[8, 9] The geography standard, AS 07.10.030(2), provided that borough boundaries are to "conform generally to the natural geography of the area" and "include all areas necessary and proper for the full development of integrated local government services." However, "all areas such as military reservations, glaciers, ice caps, and uninhabited and unused lands" are to be excluded "unless such areas are necessary or desirable for integrated local government." The property owners point out that the borough encompasses Naval Petroleum Reserve No. 4 [15] and argue that its inclusion cannot be justified as "necessary or desirable for integrated local government" because the Reserve is within the exclusive jurisdiction of the federal government leaving the borough powerless to regulate its use. In re Long's Petition, 200 F.Supp. 313 (D. Alaska 1961), leads us to a contrary conclusion. On a petition for a writ of habeas corpus, the district court was required to decide whether an alleged burglary committed within the boundaries of Naval Petroleum Reserve No. 4 could be prosecuted under Alaska law. Following a thorough review of the original order creating the Reserve,[16] the Alaska Statehood Act and its legislative history,[17] the court concluded that the state had been granted concurrent jurisdiction over the Reserve until Congress enacts legislation to the contrary.[18] We accept this reading as sound and see no impediment to the state's partial delegation of its concurrent authority to a political subdivision. This question of jurisdiction aside, the superior court properly concluded that the record evidence of the Reserve's importance to the subsistence lifestyle of area residents showed inclusion of the tract to be desirable for integrated local government so that it might fall within the new borough's planning and zoning power. This reasonably satisfies the geography standard.

borough, generally covering an extensive area including several widely dispersed small communities, incorporated and unincorporated, and the *urban borough*, having a population concentrated primarily in a single urban core area, characteristically overspilling the boundaries of a central city. It could be anticipated that the local governmental system will evolve in the two directions of unification and regionalism associated with these basic physical and socio-economic patterns.

Id. at 107–09 (emphasis in original).

15. The Reserve occupies 23 million acres, forty-seven per cent of the borough's total area. The Point Lay Military Reserve, covering three thousand acres, is also within the borough.

16. Exec.Order No. 3797–A (1923).

17. 72 Stat. 339 (1958); S.Rep.No.1163, 85th Cong., 2d Sess. (1958); H.R.Rep.No.624, 85th Cong., 2d Sess. (1958); Hearings on S. 50 before the Committee on Interior and Insular Affairs, 83d Cong., 2d Sess. (1954).

18. This conclusion is also reached in Enforcement of State Fish and Game Laws on Military Reservations, 1964 Op.Alaska Att'y. Gen. No. 2.

[10] We are also satisfied that the transportation standard has been reasonably met. The dispute surrounds the language of AS 07.10.030(4):

> The transportation facilities in the area proposed for incorporation shall be of such a unified nature as to facilitate the communication and exchange necessary for the development of integrated local government and a community of interests. Means of transportation may include surface (both water and land) and air. Areas which are accessible to other parts of a proposed organized borough by water or air only may not be included within the organized borough unless access to them is reasonably inexpensive, readily available, and reasonably safe. In considering the sufficiency of means of transportation within a proposed organized borough, existing and planned roads and highways, air transport and landing facilities, boats and ferry systems, and railroads, shall be included.

Regular travel among borough communities is available only by charter aircraft. Surface transportation is limited to dog teams and snowmachines. Even at this stage of development, we agree with the superior court that the Commission could reasonably have found travel facilities adequate to support borough government when present and future capacity is considered in the context of transportation in Alaska generally and compared to the present cost and availability of travel to centers of government which affect the lives of North Slope residents.

III. SUBSTANTIVE DUE PROCESS

By concluding that the Commission's application of the geography and transportation standards was reasonable, we reach the contention that inclusion of the plaintiff's property at Prudhoe Bay within the North Slope Borough is a denial of substantive due process. In support of this proposition, the property owners offer a series of cases striking down municipal annexations and incorporations where the lands taken have been found to receive no benefit.[19] We find this authority unpersuasive when applied to borough incorporation. In most of these cases, the courts inferred from statutes or state constitutions what has been called a "limitation of community"[20] which requires that the area taken into a municipality be urban or semi-urban in character.

> There must exist a village, a community of people, a settlement or a town occupying an area small enough that those living therein may be said to have such social contacts as to create a community of public interest and duty. . . .[21]

The limitation has been found implicit in words like "city" or "town" in statutes and constitutions[22] or inferred from a general public policy of encouraging mining or agriculture.[23] In other cases, the limitation has been expressed as a finding that the land taken is not susceptible to urban mu-

19. The property owners rely principally upon United States v. City of Bellevue, Nebraska, 474 F.2d 473 (8th Cir. 1973); State ex rel. Attorney General v. City of Avon Park, 108 Fla. 641, 149 So. 409 (1933); State ex rel. Davis v. City of Stuart, 97 Fla. 69, 120 So. 335 (1929); City of Aurora v. Bryant, 240 Ind. 492, 165 N.E.2d 141 (1960); State v. Village of Leetonia, 210 Minn. 404, 298 N.W. 717 (1941); Portland General Electric Co. v. City of Estacada, 194 Or. 145, 241 P.2d 1129 (1952).

20. 1 C. Antieau, Municipal Corporation Law § 1.04 (1973).

21. State ex rel. Davis v. Town of Lake Placid, 109 Fla. 419, 147 So. 468, 471 (1933).

22. *E. g.*, Town of Satellite Beach v. State, 122 So.2d 39 (Fla.App.1960); State v. Town of Boynton Beach, 129 Fla. 528, 177 So. 327 (1937); State ex rel. Davis v. City of Largo, 110 Fla. 21, 149 So. 420 (1933); State ex rel. Attorney General v. City of Avon Park, 108 Fla. 641, 149 So. 409 (1933); State ex rel. Davis v. City of Stuart, 97 Fla. 69, 120 So. 335 (1929); Chesapeake and O. Ry. v. City of Silver Grove, 249 S.W.2d 520 (Ky. 1952); Portland General Electric Co. v. City of Estacada, 194 Or. 145, 241 P.2d 1129 (1952).

23. *E. g.*, State ex rel. Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366 (1947).

nicipal uses.[24] The result in these cases was determined not by a test of due process but by restrictions in pertinent statutes and constitutions on the reach of municipal annexations and incorporations.

Aside from the standards for incorporation in AS 07.10.030, there are no limitations in Alaska law on the organization of borough governments. Our constitution encourages their creation. Alaska const. art. X, § 1. And boroughs are not restricted to the form and function of municipalities. They are meant to provide local government for regions as well as localities and encompass lands with no present municipal use.[25] For these reasons, the municipal cases relied upon by the property owners are poor guides to resolving whether organization of an Alaskan borough violates substantive due process.

Appellants also direct us to Myles Salt Co., Ltd. v. Board of Commissioners, 239 U.S. 478, 36 S.Ct. 204, 60 L.Ed. 392 (1916), which found creation of a drainage district to violate due process in the absence of a benefit to property within its boundaries; but the case is of limited application to this appeal. It involved a Louisiana landowner's objection to taxes levied to protect lands within the drainage district from tidal overflows. Myles Salt Company owned an island with the highest uniform elevation in southwest Louisiana, so that it suffered erosion and excessive drainage but not flooding. Taking the allegations of the company as true, the Supreme Court held that forced payment of assessments for drainage which would never benefit Myles Salt Company would constitute a denial of due process.

[11, 12] We feel three characteristics of this case warrant our attention. The question of law upon which the case turned was whether organization of the drainage district was "palpably arbitrary and a plain abuse" of the state's broad power to create special service districts.[26] We agree that the test of substantive due process is whether the action of the legislature must be said to be arbitrary.[27] Judicial concern for whether a statute comports with substantive due process goes no farther than a perception that the act furthers a legitimate governmental purpose. The question of benefit is not irrelevant, but it is only a part of the more general inquiry into arbitrariness. Because *Myles Salt* came before the Supreme Court on appeal from a dismissal for failure to state a cause of action, whether the district's boundaries were arbitrary turned upon only the allegations of the complaint. This narrowed the court's inquiry to benefit from drainage alone; other reasons for creating the district were disregarded.

> Nothing could be more arbitrary if drainage alone be regarded. But there may be other purposes, defendants say, and, besides, that the benefit to the property need not be direct or immediate; it may be indirect, such as might accrue by reason of the general benefits derived by the surrounding territory. But such benefit is excluded by the averments . . . .[28]

Moreover, the entity under attack was a drainage district and not a unit of government.

> It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other prop-

24. *E. g.*, City of Sugar Creek v. Standard Oil Co., 163 F.2d 320 (8th Cir. 1947); Waldrop v. Kansas City Southern Ry. Co., 131 Ark. 453, 199 S.W. 369 (1917); City of Aurora v. Bryant, 240 Ind. 492, 165 N.E.2d 141 (1960); State v. Village of Leetonia, 210 Minn. 404, 298 N.W. 717 (1941).

25. See note 14, *supra*.

26. 239 U.S. at 481, 36 S.Ct. at 205, 60 L.Ed. at 395.

27. *See, e. g.*, Nebbia v. New York, 291 U.S. 502, 525, 54 S.Ct. 505, 78 L.Ed. 940, 950 (1934).

28. 239 U.S. at 484, 36 S.Ct. at 206, 60 L.Ed. at 396.

erty, there is an abuse of power and an act of confiscation.[29]

As exampled below, there may be acceptable public purposes which justify creation of a body of government but do not confer a felt benefit upon particular property owners. The lesson of *Myles Salt* which survives generalization from its particular facts to this appeal is only the familiar principle that the legislature may not act arbitrarily.

[13] We can perceive why the legislature might authorize organization of a North Slope borough. As an example, private developers at Prudhoe Bay may gear their investments in the design and construction of camps, roads, airports and the like for a maximum return over the projected life of the surrounding oil fields. The state, on the other hand, may prefer development of the surface with a view to its long-run utility as a permanent arctic community. Need for the state to oversee the course of private development could be met by a local government body which promulgates and enforces planning and zoning regulations.[30]

[14] The uncontested ability of the property owners to supply many of the services which the North Slope Borough is empowered to provide is not relevant to the question of due process. Judicial inquiry does not reach whether incorporation is desirable. The state may reasonably conclude that private development interests do not align with the public interest, that the economic motivating co-ordinated development may evolve in time to favor independent action by the property owners, and that, for example, an active planning and zoning authority in the form of a borough would assure that private agreements and intentions do not waiver and development diverge from the long-range interests of North Slope residents and the state.

IV. APPROVAL OF THE PETITION BY THE LEGISLATURE

[15] The property owners also argue that the accepted incorporation petition should have been submitted by the Local Boundary Commission to the legislature. They contend this course is required by article X, section 12 of the Alaska constitution which provides:

> *Boundaries.* A local boundary commission or board shall be established by law in the executive branch of the state government. *The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session.* The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish pro-

29. *Id.* *Compare* State ex rel. Pan American Production Co. v. Texas City, 157 Tex. 450, 303 S.W.2d 780, 783 (1957).

We note that the Supreme Court had previously held matters of local government organization to be within the absolute discretion of the state. No question of federal due process could be raised. Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907). *Myles Salt* did not disturb this holding. It has been narrowed by subsequent voting rights cases, *e. g.*, Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962); Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), to permit annexations to be attacked on equal protection and right to vote theories; but the substantive due process holding remains intact. Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir.), cert. denied, 389 U.S. 975, 88 S.Ct. 476, 19 L.Ed.2d 467 (1967); Detroit Edison Co. v. East China Township School District No. 3, 247 F.Supp. 296 (E.D.Mich.1965), aff'd, 378 F.2d 225 (6th Cir.), cert. denied, 389 U.S. 932, 88 S.Ct. 296, 19 L.Ed.2d 284 (1967).

30. We can further perceive that the residents of the North Slope may wish to exercise local control over education and the construction of local schools. While such an activity might not appeal in any way to those engaged in industrial development of the oil resource, local education has been a strongly contested issue between Indian and Eskimo people and the Bureau of Indian Affairs for a number of years.

cedures whereby boundaries may be adjusted by local action. (emphasis added)

Organization of a borough involves a boundary change, in their view, because the entire state is divided into several organized and one residual unorganized borough.[31] Creation of an organized borough necessarily changes the boundaries of the unorganized borough. They then read the language of section 12 to confer upon the Local Boundary Commission power to consider the incorporation petitions but not to approve them without submission to the legislature. Supporters of the borough respond by asserting that the power to create boroughs derives from section 3 of article X. This provides:

> *Boroughs.* The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible. The legislature shall classify boroughs and prescribe their powers and functions. *Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.* (emphasis added)

The borough's supporters assert that because the legislature delegated the power of incorporation to the Local Boundary Commission through Title 7 without reserving any power of review the Commission's decision need not be submitted to the legislature. We agree. Section 3 vests in the legislature power to prescribe procedures for borough incorporation without restriction. The framework of Title 7 and the past conduct of the Local Boundary Commission persuade us that both the legislature and the agency charged with organizing boroughs have adopted this construction. The only legislative reservation in Title 7 was addressed to adjustments made by the Commission in boundaries of organized boroughs.[32] By its term, AS 07.10.020 did not apply to the act of incorporation. It required a local election on the question of borough organization after acceptance of the petition by the Local Boundary Commission and provided that, upon certification of a majority of votes in favor of organization, the Lieutenant Governor "shall declare that the area . . . is an organized borough".[33] No duty to seek or await legislative approval of the petition was interposed.[34]

[16] Aside from the powers granted by article X, section 3, the weakness of appellants' argument that section 12 requires submission of the accepted incorporation petition to the legislature lies in their equation of the boundary changes contemplated by section 12 with the unavoidable diminution of the residual unorganized borough whenever a functioning borough government is created. Oesau v. City of Dil-

31. AS 07.05.010, now AS 29.03.010, provided: All areas in the state which are not within the boundaries of an organized borough constitute a single unorganized borough. See Alaska const. art. X, § 3, in the text accompanying this note.

32. AS 07.10.125 provided:
Boundary adjustments. (a) The Local Boundary Commission may hold public hearings in each area incorporated as an organized borough to determine the necessity for boundary adjustments.
(b) Boundary adjustments may include expanding the boundaries, contracting the boundaries, dividing the areas into two or more areas, or combining two or more areas.
(c) Boundary adjustments made by the Local Boundary Commission shall be submitted to the legislature during the first 10 days of a regular session. The boundary adjustments become effective 45 days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house.

33. AS 07.10.120(f).

34. In addition, the Local Boundary Commission previously organized two boroughs without submitting the petitions to the legislature; these were the Bristol Bay Borough, in 1962, and the Haines Borough, in 1968. This establishes a pattern of interpretation by the bodies charged with implementing article X which we will not overrule except for weighty reasons. Whaley v. State, 438 P.2d 718, 722 (Alaska 1968).

lingham, 439 P.2d 180, 183–184 (Alaska 1968), established that

> [t]he basic purpose for creating the boundary commission and conferring upon it the powers that it possesses was to obviate the type of situation . . . where there was a controversy over municipal boundaries which apparently could not be settled at the local level.[35]

In this appeal, the superior court correctly determined that this policy does not reach creation of an organized borough from the nonfunctioning unorganized borough. The court observed:

> No allocation of assets or liabilities, and no apportionment of the tax burden to be borne by property owners in the two areas resulting from borough organization is involved. There is no problem respecting apportionment of continuing debt service to existing bond holders. The organized borough, if it comes into being, will merely fill a governmental vacuum now existing.

Carving a new unit of government from the unorganized borough generates no controversy between governments with competing economic and political interests. The conflicts accompanying boundary adjustments between two functioning governments which must be submitted to the legislature under section 12 do not afflict mere incorporation.

Nor is the constitutional history to which we are directed by the property owners persuasive. The single relevant remark is ambiguous and inconclusive on this point. In the debate on adoption of article X before the full convention, Delegate Doogan commented:

> The reason that [section 12] was put in like this was that many times between local government areas they will, by agreement, make boundary changes. These changes, as it is written of necessity, must have the approval of the commission and then again be presented to the legislature. . . . In all cases, any changes that are made must be submitted to the legislature.[36]

Mention of agreements between two existing local governments to adjust mutual boundaries vitiates whatever force the board references in the debate to "all cases" might have in resolving whether incorporation petitions must be submitted to the legislature. The convention simply did not address the question. Accordingly, we adopt the view of the superior court, the legislature and the Local Boundary Commission and hold that submission of an accepted incorporation petition to the legislature is not required by the state constitution.

V. ATTORNEYS' FEES

[17, 18] Finally, the property owners contend that the superior court's award of $20,000 attorneys' fees to the prevailing parties was improper. Such award is permitted by Alaska Rule of Civil Procedure 82(a) and will not be set aside absent an abuse of discretion.[37] Appellants ask that we declare the award in this case to be an abuse of discretion as a matter of law because the public interest is involved. Their argument relies on the premise that fear of incurring this expense will deter a citizen from litigating questions of general interest to the community. Because the sums at stake in this controversy are large enough to prompt a suit without consideration of the public interest, the superior court could have concluded that the property owners were acting in their private interests and not in behalf of the public. Under the circumstances, we decline to hold that the award of attorneys' fees in this case amounted to an abuse of discretion.

The decision of the superior court is affirmed.

BOOCHEVER, J., not participating.

35. *Accord*, Fairview Public Utility District No. 1 v. City of Anchorage, 368 P.2d 540 (Alaska 1962).

36. 4 Proceedings of the Constitutional Convention at 2751 (1956).

37. *E. g.*, Jefferson v. City of Anchorage, 513 P.2d 1099, 1103 (Alaska 1973); Dale v. Greater Anchorage Area Borough, 439 P.2d 790, 793 (Alaska 1968).

522 P.2d 1147, Port Valdez Co., Inc. v. City of Valdez, (Alaska 1974)

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> that no juvenile or delinquent juvenile shall be placed or detained in a prison, jail or lockup, or detained or transported in association with criminal, vicious or dissolute persons.

Clearly, under this compact, no juvenile, regardless of whether he has reached eighteen while awaiting court proceedings, can be imprisoned. If he is detained, he must be held apart from adult criminals.

To be sure, the compact does not dictate the result in this case because it regulates Alaska's relations with other states, not the federal government with whom appellant Davenport was placed. Even though the compact does not control, it surely stands as an expression of our state's policy on confining juveniles who reach eighteen before their delinquency hearings. Reading the unexceptioned language of the compact together with the majority's construction of AS 47.10.190 would yield an apparent intent of the legislature that juveniles like Davenport who are adjudicated delinquent in Alaska and confined in this state or elsewhere through contract with the federal government may be held in prisons in the company of adult criminals while juveniles who also reach their eighteenth birthday before adjudication and who are found delinquent here but confined in other states or vice versa must be placed apart from adult criminals.

I cannot conceive of any set of circumstances which would lead the legislature to make this distinction. It is my view that the legislature's intentions can be better ascertained by reading AS 47.10.190 and other apposite statutes—AS 47.10.060. AS 47.10.280,[2] and AS 47.15.010 Articles III and IX—as an interrelated and coherent whole. Because there are good reasons here to believe that AS 47.10.190 and AS 47.10.290(6) read in isolation do not fully and accurately embody the legislature's intent, our policy against extending statutory language which expresses that intent does not apply.[3] Accordingly, I would hold as we did in P. H. v. State that for the purpose of determining placement the term "minor" refers to the age of the juvenile at the time he commits the acts resulting in his confinement.

On this reading, the instruction given by the superior court was erroneous because it did not state when the status of "minor" under the detention statute was to be determined. I would set aside the judgment below and remand the case for a new trial on the issue of the defendants' liability for Davenport's confinement in a federal penitentiary.

2. AS 47.10.280 declares the broad policy of Alaska's juvenile statutes to be "to secure for each minor the care and guidance which is as nearly as possible equivalent to that which should be given him by his parents."

3. Territory of Alaska v. Five Gallons of Alcohol, 10 Alaska Reports 1, 7–8 (1940); see Aleutian Homes v. Fischer, 418 P.2d 769, 774 (Alaska 1966). *Compare* Alaska Mines and Minerals, Inc. v. Alaska Indus. Bd., 354 P.2d 376, 379 (Alaska 1960).

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An annexation by a city was challenged but upheld by the State of Alaska Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J. The challenging corporation appealed. The Supreme Court, Boochever, J., held that under evidence, the city exercised sufficient municipal powers under the annexation order in the annexed area to satisfy the doctrine of de facto municipal incorporation.

Affirmed.

Erwin, J., did not participate.

1. Municipal Corporations ⇐33(1)

Where city did not request, and local boundary commission did not certify, a step annexation, statutory requirements for step annexation were not applicable, though service areas with differing municipal services and tax rates were established after annexation. AS 29.53.405, 29.68.010, 44.19.260, 44.19.260(a)(4), (b)(2); Const. art. 10, § 12.

2. Municipal Corporations ⇐33(8)

Policy decision as to mode of annexation is exercise of lawfully vested administrative discretion which will be judicially reviewed only to determine if administrative, legislative or constitutional mandates were disobeyed or if action constituted abuse of discretion. AS 29.53.405, 29.68.010, 44.19.260, 44.19.260(a)(4), (b)(2); Const. art. 10, § 12.

3. Municipal Corporations ⇐33(1)

Where local boundary commission had not adopted standards for changing local boundary lines as required, continued failure to do so made annexation voidable and prima facie illegal, and same was null and void unless validated by some overriding doctrine. AS 44.19.260.

4. Municipal Corporations ⇐18

Where doctrine of de facto municipal incorporation applies, private parties may not successfully bring suit challenging legality of corporate existence. AS 09.50.310.

5. Corporations ⇐29(1)
Municipal Corporations ⇐18

Statute providing sole means of attack upon de facto corporation, municipal or private, contemplates action by Attorney General, not by private party. AS 09.50.310.

6. Municipal Corporations ⇐17

Annexation is corporate reorganization of sufficient dignity that attack upon it challenges corporate essence in manner justifying application of doctrine of de facto municipal incorporation. AS 09.50.310.

7. Municipal Corporations ⇐33(1)

Elements which must be present for prima facie voidable annexation to escape challenge include (1) constitutional or statutory provision under which annexation might lawfully have been accomplished, (2) attempted compliance in good faith with such provisions, (3) colorable compliance with the provisions, and (4) assumption in good faith of municipal powers over the annexed territory. AS 09.50.310, 44.19.260; M.S.A. § 414.09, subd. 2.

8. Municipal Corporations ⇐33(8)

Annexations effected through local boundary commission procedures receive full administrative hearing, followed by legislative review, before they are subjected to judicial scrutiny, and complex social, political and economic judgments leading to decision whether annexation is wise will be overturned only when they involve abuse of discretion. Const. art. 10, § 12; AS 44.19.260(a)(4), (b)(2).

9. Municipal Corporations ⇐33(8)

Proper test of whether procedural defect is so material as to vitiate colorable compliance with applicable statute and thereby strip annexation of de facto municipality protection parallels test of plain error in civil cases, i. e., whether it is so substantial as to result in injustice. Const. art. 10, § 12; AS 44.19.260(a)(4), (b)(2).

10. Municipal Corporations ⇐29(1)

Purposes of statutory requirement of annexation standards are to expose basic decision-making processes of local boundary commission to public view and thus subject commission action to broad corrective legislation, to guide local governments in making annexation decisions and in preparing proposals for commission, and to objectify criteria of decision making and delineate battleground for public hearing. AS 44.19.260(a)(4), (b)(2).

11. Municipal Corporations ⇐17

Under evidence, city exercised sufficient municipal powers under annexation order in annexed area to satisfy doctrine of de facto municipal incorporation. AS 09.50.310, 44.19.260(a)(4), (b)(2).

John W. Pletcher, III, Merdes, Schaible, Staley & DeLisio, Anchorage, for appellant.

Kenneth P. Jacobus, Hughes, Thorsness, Lowe, Gantz & Clark, Anchorage, for appellee City of Valdez.

David B. Ruskin, Anchorage, for appellee Local Boundary Comm.

Before RABINOWITZ, Chief Justice, CONNOR, BOOCHEVER and FITZGERALD, Justices, and DIMOND, Justice Pro Tem.

OPINION

BOOCHEVER, Justice.

The instant action chronicles the latest chapter in the acrimonious relationship between the Port Valdez Company, plaintiff and appellant here, and the City of Valdez, Alaska.[1] At stake is the validity of a substantial annexation by the city of land which encompasses a parcel of the company's property. Underlying this more abstract determination is the legality of the tax burden the city seeks to impose upon the company's land.

The earthquake of March 27, 1964 rendered the former site of the City of Valdez unsuitable for human habitation or commercial development; the city was rebuilt on property formerly owned by the company.[2] As the rebuilt community strengthened its foothold on the southcentral coast of Alaska, expansion occurred beyond the boundaries of the land deeded after the earthquake. Simultaneously, the prospect that Valdez would become the terminus for the pipeline from the North Slope oilfields led to predictions of substantial municipal growth. In order to conform the city's boundaries to the existing area of actual services rendered, to extend full municipal services to the adjacent area and to plan for future growth, on November 5, 1969, the City of Valdez petitioned the Local Boundary Commission for an extention ot its boundaries to include the entire port area and adjacent territory. The proposed annexation comprised 274 square miles, of which the company owns less than one square mile. After the city filed a supplemental petition, the commission held a public hearing on the proposed annexation, at which the company protested the proposal. The commission approved the annexation at its January 4, 1970 business meeting. The annexation became effective when, after proper presentation, the legislature failed to disapprove the commission's action.[3] A certification of boundaries was duly filed by the commission, noting that the annexation became effective March 8, 1970.

Immediately after the annexation became effective, the company began negotiations with the city concerning the company's tax burden on that portion of its land which had been included in the restructured city. Some temporary compromises were effected, but when no ultimate solution was agreed upon, the company paid $18,335 in assessed taxes under protest and filed this action seeking declaratory relief invalidating the annexation and restoration of the taxes paid under protest. The action was filed on December 20, 1971, more than a year and nine months after the effective date of the annexation.

In its suit against the city, the company contended that a step annexation had been

1. *See* Port Valdez Co. v. City of Valdez, 437 P.2d 768 (Alaska 1968).

2. *Id.* at 769.

3. Alaska Constitution, art. X § 12 provides: A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

effected.[4] It charged that the annexation was void because the Local Boundary Commission failed to promulgate standards for annexations, failed to promulgate standards for step annexations, failed to hold the election required by the step-annexation legislation, failed to create a transition schedule for provision of municipal services to the annexed area and failed to establish prorated tax mill levies proportional to the services provided, as required by the same legislation. The city, the commission and the state in their answers denied the allegation that the Valdez annexation was a step annexation, and challenged the validity of the legal theories underlying the company's complaint. They also asserted immunity under the doctrine of de facto municipal incorporation as an affirmative defense. Later, the affirmative defense of laches was raised without procedural objection from the company.

After cross-motions for summary judgment, the superior court held a hearing at which Owen Meals, president of the Port Valdez Company, and Herbert W. Lehfeldt, city manager of the City of Valdez, testified. Most of the testimony was directed to the issues of de facto corporation immunity and laches. The court granted summary judgment for the city, primarily because he found the annexation immune from attack under the doctrine of de facto municipal incorporation. Findings favorable to the city on the step-annexation and laches issues were also made. This appeal followed.

We must decide whether the annexation suffered from any defect which could cause its invalidity, and, if so, whether the annexation is immune from attack either under the doctrine of de facto municipal incorporation or because the suit is barred by laches.

APPLICATION OF THE STEP-ANNEXATION PROVISIONS

[1, 2] The company first contends that the commission failed to hold an election and follow other procedures mandated by the step-annexation provisions of the statute regulating local boundary changes.[5] However, the company has never made clear why the Valdez annexation ought to be considered a step annexation. The Alaska Constitution, art. X § 12[6] established two methods by which local boundaries might be changed: (1) by direct action of the Local Boundary Commission subject to legislative disapproval,[7] and (2)

4. The legislature has provided for gradual, as opposed to immediate annexation. AS 44.19.260(a)(4) provides:

> The local boundary commission shall
>
> . . . . .
>
> (4) develop standards and procedures for the extension of services and ordinances of incorporated cities into contiguous areas for limited purposes upon majority approval of the voters of the contiguous area to be annexed and prepare transition schedules and prorated tax mill levies as well as standards for participation by voters of these contiguous areas in the affairs of the incorporated cities furnishing services.

AS 44.19.260(b)(2) provides:

> The local boundary commission may
>
> . . . . .
>
> (2) present to the legislature during the first 10 days of a regular session proposed local government boundary changes, including gradual extension of services of incorporated cities into contiguous areas upon a majority approval of the voters of the contiguous area to be annexed and transition schedules providing for total assimilation of the contiguous area and its full participation in the affairs of the incorporated city within a period not to exceed five years.

5. The step-annexation provisions of AS 44.19.260 are set out *supra*, n. 4.

6. Alaska Constitution, art. X § 12 is set out in full *supra*, n. 3.

7. We have previously recognized that the intention of the constitutional provision and its implementing statute, AS 44.19.260, was to provide an objective administrative body to make state-level decisions regarding local boundary changes, thus avoiding the chance that a small, self-interested group could stand in the way of boundary changes which were in the public interest. In Fairview Public Utility District No. 1 v. City of Anchorage, 368 P.2d 540, 543 (Alaska 1962), appeal dismissed, 371 U.S. 5, 83 S.Ct. 39, 9 L.Ed.2d 49 (1962) we said:

> An examination of the relevant minutes [of the constitutional convention] shows clearly

by establishment by the commission of procedures for the adjustment of boundaries by local action. The legislature implemented art. X § 12 in 1959 by enacting AS 44.19.260. Only the simple, direct annexation by the commission was authorized at that time.

The step-annexation provisions were added to AS 44.19.260 in 1964.[8] As an alternative to immediate annexation, these provisions allow for gradual assimilation of contiguous areas into incorporated cities where direct annexation would be premature or impractical. Ordinarily, a step annexation will be commenced by a municipality's petition specifically requesting that alternative,[9] although presumably the commission could require the municipality to annex by the step method. In the instant case the company has adduced no evidence that either the city or the commission contemplated a step annexation. The original petition requested a direct annexation and the certification of boundaries (a document similar to a judgment accompanied by findings of fact, which formally establishes the new boundaries) contains not a single fact, conclusion or order suggesting that a step annexation was contemplated. Since the city did not request and the commission did not certify a step annexation, the requirements for step annexation are not applicable.

The company has argued that because service areas with differing municipal services and tax rates were established *after* the annexation, the annexation must be considered to have been effected by the step method. We find the selection of annexation method made by the commission and approved by the legislature to be controlling. The company's argument amounts to an assertion that the differing municipal services and tax rates demand the choice of the step method. We find no such fetters imposed upon the commission's discretion. The policy decision as to the mode of annexation is an exercise of lawfully vested administrative discretion which we will review only to determine if administrative, legislative or constitutional mandates were disobeyed or if the action constituted an abuse of discretion.[10] The company has adduced no facts from which we can conclude that the approval of direct annexation for the Valdez expansion constituted an abuse of discretion. The company relies upon the statement of the city that one of the purposes of the annexation was the extension of services into unincorporated territory. This argument misses the point that all annexations will have the purpose and effect, in part, of extending city services. The post-annexation creation of differently served and treated areas does not impugn the reasonableness of the

the concept that was in mind when the local boundary commission section was being considered: that local political decisions do not usually create proper boundaries and that boundaries should be established at the state level.

See Oesau v. City of Dillingham, 439 P.2d 180, 183–184 (Alaska 1968).

8. Ch. 55 SLA 1964. The local action provision has also been implemented by legislation (AS 29.68.010) and by administrative action (19 AAC § 15.010 et seq.).

9. 19 AAC § 10.190 provides:

An annexation petition submitted to the Local Boundary Commission may request that during each of not more than five full fiscal years after the annexation takes effect, the rate of taxation for city services on the annexed properties shall be at a specified percentage of the full city tax rate. The proposal shall provide an increase from fiscal year to fiscal year until the percentage equals 100 percent of the full city tax rate. The city may not tax annexed property at a rate other than the percentage authorized for that year. Provided, however, that the municipality pursuant to AS 29.53.405 may levy taxes in the annexed area at a different percentage from that authorized for the year in question, if such difference is attributed to the cost of provision in the territory of a special service not supported by the general municipal levy.

10. Mobil Oil Corp. v. Local Boundary Commission, 518 P.2d 92, 98 (Alaska 1974); King v. Alaska State Housing Authority, 512 P.2d 887, 893–895 (Alaska 1973); Kingery v. Chapple, 504 P.2d 831, 834 (Alaska 1972); Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971).

annexation.[11] Nor can the company point to any constitutional, statutory or administrative provision which requires that an annexation of territory like that absorbed by the City of Valdez be accomplished by the step method.

We therefore hold that the Valdez annexation was undertaken by the direct method rather than the step method.[12] It follows that the company's contentions regarding the necessity of an election, schedule of services and tax mill levies as mandated by the step-annexation provisions are without merit.

FAILURE OF THE COMMISSION TO ADOPT STANDARDS

[3] The proceedings before the commission respecting the Valdez annexation —petition, public hearing and formal approval—all took place in late 1969 and early 1970. The appellees admit that the commission had not, at that time, adopted standards for changing local boundary lines as required by AS 44.19.260.[13] In United States Smelting, Refining & Mining Co. v. Local Boundary Commission,[14] we held that the failure of the commission to adopt such standards before public hearings into an annexation are held, and before it submitted proposals to the legislature, made the annexation voidable upon timely attack. We found the failure to promulgate legislatively-mandated standards before the *Nome* hearings to be so unreasonable as to undermine the validity of the annexation.

The commission acted on the Valdez annexation almost a year after its *Nome* hearings. The continued failure to have promulgated standards makes the Valdez annexation *a fortiori* voidable and prima facie illegal.[15] Therefore, the present annexation is null and void unless validated by some overriding doctrine.

DE FACTO INCORPORATION

[4, 5] The doctrine of de facto municipal incorporation was developed by American courts in the nineteenth century. Its purpose was to insulate nascent local governments from devastating disincorporations resulting from private attacks based upon minor procedural errors which were common to the formation of such governments by laymen.[16] One early commentator well summarized the principle:

> Briefly stated, the doctrine is that where there is authority in law for a municipal corporation, the organization of the people of a given territory as such a corporation under color of delegated authority, followed by a user in good faith of the governmental powers incidental thereto, will be recognized by the law as a municipal corporation de facto, wher-

11. The service areas were created under authority of a city charter amendment implemented by a city ordinance; there was no question raised by the company respecting the validity of either.

12. We note that the superior court loosely referred to the Valdez annexation as a "step annexation" during argument on the cross-motions for summary judgment. However, the findings of fact and conclusions of law contain no such statement. The superior court did conclude: "AS 44.19.260 does not require, under the facts of this particular case, that a local election be held to approve this annexation." We take this conclusion to mean that the court found the Valdez annexation not to be a step annexation.

13. AS 44.19.260 provides:

> The local boundary commission shall
>
> . . . . .
>
> (2) develop proposed standards and procedures for changing local boundary lines. . . .

14. 489 P.2d 140 (Alaska 1971) [hereinafter cited as *Nome*].

15. We note that the required standards were promulgated by the commission after our decision in the *Nome* case. *See* 19 AAC 05.010 et seq. October 13, 1972, Reg. 43.

16. Tooke, De Facto Municipal Corporations Under Unconstitutional Statutes, 37 Yale L.J. 935, 935–39 (1928); Rothkopf v. City of Danbury, 156 Conn. 347, 242 A.2d 771, 776 (1968); Clement v. Everest, 29 Mich. 19, 22 (1874), quoted I Antieau, Municipal Corporation Law § 1.08 at 26.

ever through the failure to comply with the constitutional or statutory requirements the corporation cannot be said to exist de jure.[17]

Where the doctrine of de facto incorporation applies, private parties may not successfully bring a suit challenging the legality of corporate existence.[18]

[6] Disincorporation of a municipality substantially disrupts the life and livelihood of anyone associated with the municipality. Among the deleterious consequences of a disincorporation are the diselection of public officials, invalidation of corporate actions (possibly creating individual liability on the part of public officials or unjustly depriving employees, contractors and other creditors of claims against the corporate body), and voiding of actions taken under the police, taxation and eminent domain powers. Not all these consequences necessarily flow from a disannexation as distinguished from a total disincorporation. The governmental entity retains its charter, at least with respect to its boundaries prior to the annexation. Nevertheless, substantial disruption similar to the results of disincorporation may occur. We therefore conclude that an annexation is a corporate reorganization of sufficient dignity so that an attack upon it challenges the corporate essence in a manner justifying the application of the doctrine of de facto municipal incorporation.

We presaged our application of the doctrine of de facto incorporation to such cases when we said, in a footnote in the *Nome* case: "Existing cities with Local Boundary Commission created boundaries remain unaffected by our holding in this case under the *de facto* municipality doctrine." [19] the *Nome* case inferentially held the doctrine of de facto municipal incorporation inapplicable because the Nome annexation was challenged within two months of its effective date, and there was no evidence that the city had exercised any municipal powers in the annexed area.[20] In our *Nome* decision, we cited a recent case decided by the Supreme Court of Connecticut holding that a merger of two municipalities was immune from private attack under the doctrine of de facto munici-

17. Tooke, *supra* n. 16 at 935.

18. Claus v. City of Fairbanks, 95 F.Supp. 923, 926, 13 Alaska 201 (D.Alaska 1951); Cooper v. Leslie Salt Co., 70 Cal.2d 627, 75 Cal.Rptr. 766, 770, 451 P.2d 406, 410 (Cal. 1969), cert. denied, 396 U.S. 821, 90 S.Ct. 62, 24 L.Ed.2d 72 (1969). *Claus* and *Cooper* involve respectively a utility board and a special improvement district, quasi-municipalities, but the principles there set forth apply to municipalities. *See* I Antieau, Municipal Corporation Law § 1.08; I McQuillin, Municipal Corporations § 3.49.

But cf. AS 09.50.310.

> An action may be brought by the attorney general upon his own information or upon complaint of a private party against . . . (3) any number of persons acting as a corporation without being incorporated.

That statute is the modern equivalent of quo warranto, which previously was held to be the sole means of attack upon a de facto corporation, municipal or private. People of Territory of Alaska ex rel. Bowman v. Alaska Airlines, Inc., 108 F.Supp. 274, 276, 14 Alaska 85, 88–89 (D.Alaska 1952), rev'd on other grounds, Alaska Airlines, Inc. v. People of Territory of Alaska ex rel. Bowman, 206 F.2d 203, 14 Alaska 363 (9th Cir. 1953); Turkington v. City of Kachemak, 380 P.2d 593, 596 (Alaska 1963). AS 09.50.310 clearly contemplates an action *by the attorney general*, not by a private party. The only court which has entertained an action by a private party under AS 09.50.310 or its predecessors allowed such action only upon a showing that the interest of the private party in the action outweighed the public interest and that demand upon the appropriate authority to institute action either had been made or would be futile. People of Territory of Alaska ex rel. Bowman v. Alaska Airlines, Inc., 108 F.Supp. at 276, 14 Alaska at 88, rev'd on other grounds, 206 F.2d 203, 14 Alaska 363. The Port Valdez Company has not sought to bolster this lawsuit by reference to AS 09.50.310, and we need not further concern ourselves with interpretation of that statute.

19. United States Smelting, Refining & Mining Co. v. Local Boundary Commission, 489 P.2d at 144 n. 15.

20. *See* Record, Civil Action 68–117, Superior Court, First Judicial District, Juneau, at 1 ff.

pal incorporation.[21] Courts of other states have held that annexations are subject to the doctrine.[22] We hold that the doctrine of de facto municipal incorporation applies to annexations and proceed to apply the doctrine to the facts of the Valdez annexation.

[7] Adapting the most generally accepted definition of the doctrine to annexations, the following four elements must be present in order for a prima facie voidable annexation to escape challenge: (1) a constitutional or statutory provision under which the annexation might lawfully have been accomplished; (2) an attempted compliance in good faith with the provision(s); (3) a colorable compliance with the provision(s); and (4) an assumption in good faith of municipal powers over the annexed territory.[23] AS 44.19.260[24] and procedural regulations promulgated by the commission[25] clearly provide a framework under which an annexation such as that proposed by the City of Valdez could lawfully be effected. The company cannot seriously dispute that the city attempted in good faith to comply with the statute since the city followed the only statutory procedure then available for annexation, and the record is devoid of any evidence of bad faith. The vital elements in testing the Valdez annexation are whether the city colorably complied with the statutes, and whether it sufficiently assumed corporate powers over the annexed territory (again, there is no dispute that whatever power the city exercised, it did so in good faith).

[8, 9] Courts have often interpreted the colorable compliance requirement to mean that a defect, in order to render an incorporation or annexation void, must be material, as opposed to technical.[26] The unique

21. Rothkopf v. City of Danbury, 156 Conn. 347, 242 A.2d 771.

22. Skinner v. City of Phoenix, 54 Ariz. 316, 95 P.2d 424, 426–427 (1939), *approved in* Gorman v. City of Phoenix, 70 Ariz. 59, 216 P.2d 400, 403 (1950); Hazleton v. City of San Diego, 183 Cal.App.2d 131, 6 Cal.Rptr. 723, 726 (1960), cert. denied, 366 U.S. 910, 81 S.Ct. 1084, 6 L.Ed.2d 235 (1961), reh. denied, 368 U.S. 870, 82 S.Ct. 25, 7 L.Ed. 2d 71 (1961); Griffin v. City of Canon City, 147 Colo. 15, 362 P.2d 200, 201 (1961); Petition of Kansas City, 190 Kan. 308, 374 P.2d 35, 39 (1962); Saylor v. Town of Wallins, 220 Ky. 651, 295 S.W. 993, 994 (1927); White v. City of Columbia, 461 S.W.2d 806, 807 (Mo.1970); Kuhn v. City of Port Townsend, 12 Wash. 605, 41 P. 923, 925 (1895). The only contrary authority may be found in Boise City v. Better Homes, Inc., 72 Idaho 441, 243 P.2d 303, 305 (1952). But the *Boise City* case allows attack only for a "jurisdictional defect". *Id*: at 306. The only state other than Alaska which employs a statewide commission to adjust local boundaries, Minnesota, has not been forced to reach the issues presented here because decisions of its commission are appealable under its administrative procedure act. 1971 Minn. Stat. § 414.07 subdn. 2. Ordinary principles of administrative law apply. *See* Village of Goodview v. Winona Area Industrial Development Association, 289 Minn. 378, 184 N.W.2d 662, 664 (1971).

23. *See* I McQuillin, Municipal Corporations § 3.48a at 319–20; I Antieau, Municipal Corporation Law § 1.03; *e. g.*, Cooper v. Leslie Salt Co., 70 Cal.2d 627, 75 Cal.Rptr. 766, 770, 451 P.2d 406, 410.

24. AS 44.19.260 provides in part:

> (a) The local boundary commission shall . . . . . .
>
> (3) consider a local government boundary change requested of it by the legislature, the director of local affairs, or a political subdivision of the state; and . . . . . .
>
> (b) The local boundary commission may
>
> (1) conduct meetings and hearings to consider local government boundary changes and other matters related to local government boundary changes, including extensions of services by incorporated cities into contiguous areas and matters related to extension of services; and
>
> (2) present to the legislature during the first 10 days of a regular session proposed local government boundary changes. . . .

25. Despite the failure to promulgate *standards*, the commission long has operated under detailed procedural regulations in annexation cases. The current version, 19 AAC § 10.010 et seq., is similar to the one in force at the time of the Valdez annexation, Reg. 7, eff. Sept. 26, 1962.

26. Claus v. City of Fairbanks, 95 F.Supp. at 926; Peterson v. Bountiful City, 25 Utah 2d 126, 477 P.2d 153, 155 (1970). *See* State ex rel. Landis v. Town of Boynton Beach, 129 Fla. 528, 177 So. 327 (1937); City of Delphi v. Startzman, 104 Ind. 343, 3 N.E.

Alaska annexation procedures present problems different from those encountered by other courts in determining whether a defect is material or not. Courts in other jurisdictions ordinarily must review only the actions of the municipality in assessing the validity of the annexation; annexations effected through Local Boundary Commission procedures receive a full administrative hearing, followed by legislative review, before they are subjected to judicial scrutiny. The complex social, political and economic judgments leading to the decision as to whether an annexation is wise fall more properly within administrative and legislative competence; ordinarily those decisions will be overturned only when they involve an abuse of discretion.[27] The more common challenge to Local Boundary Commission action, that made here by the company, attacks the procedures by which the substantive decisions were made. Where the other elements of the de facto incorporation doctrine exist, a procedural challenge following both administrative and legislative review should succeed only where it is clear that the defective procedures prevented the opponents of annexation from fully and fairly presenting their case to the reviewing bodies. The proper test to determine whether a procedural defect is so material that it vitiates colorable compliance with the applicable statute and thereby strips the annexation of de facto municipality protection parallels the test of plain error in civil cases: whether the error is so substantial as to result in injustice.[28] In this instance the injustice, if any, would be caused by preventing the full and fair expression of opposing viewpoints. The errors alleged by the company must be tested according to this standard.

[10] The company has not alleged that any material argument against the annexation was suppressed or overlooked at the public hearing because of the commission's failure to promulgate standards. We see three purposes underlying the statutory requirement of annexation standards. First, such standards expose the basic decision-making processes of the commission to public view and thus subject commission action to broad corrective legislation.[29] Second, the standards guide local governments in making annexation decisions and in preparing proposals for the commission. Frustration of these purposes cannot harm the opponent of annexation. Third, annexation standards objectify the criteria of decision-making and delineate the battleground for a public hearing,[30] but we cannot perceive how the absence of such delineation in any manner prevented full and fair expression of the company's position at the hearing on the Valdez annexation. The failure to promulgate standards for

937, 939-940 (1885); Your Food Stores, Inc. (NSL) v. Village of Espanola, 68 N.M. 327, 361 P.2d 950, 956-957 (1961), cert. denied, 368 U.S. 915, 82 S.Ct. 194, 7 L.Ed.2d 131 (1961); City of West Lake Hills v. State ex rel. City of Austin, 466 S.W.2d 722, 727 (Tex.1971); cf. Johnson v. Sandy City Corp., 28 Utah 2d 22, 497 P.2d 644, 645 (1972). *See generally* I McQuillin, Municipal Corporations § 348a, at 320 (1971 rev. ed.).

27. *See* n. 10, *supra*. We do not here decide whether annexation decisions are reviewable for reasonableness. Appellant has urged that position, but the issue was not raised in the superior court.

28. *See* Malvo v. J. C. Penney Co., 512 P.2d 575, 585 n. 14 (Alaska 1973); Bolden v. City of Kodiak, 439 P.2d 796, 800 n. 16 (Alaska 1968).

29. Our *Nome* opinion focused upon the commission's failure to heed the legislature's commands in exercising the commission's jurisdiction and publicly accounting for its decisional process:

> To [hold] otherwise would be to condone the commission's nonobservance of a valid legislative prerequisite to the exercise of the commission's discretion in matters of local boundary changes.

United States Smelting, Refining & Mining Co. v. Local Boundary Commission, 489 P. 2d at 142.

30. *See* Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc., 516 P.2d 408, 415 n. 23 (Alaska 1973).

annexations was not an error so substantial as to result in injustice.

Having already held that the company failed to prove that the Valdez annexation was a step annexation, we need not question further whether the failure to promulgate standards for step annexations worked an injustice upon the company.[31]

[11] Based on the undisputed facts, the superior court granted summary judgment, holding that the city had exercised sufficient municipal powers in the annexed area so that the doctrine of de facto incorporation was satisfied. At the time of the hearing on the motion for summary judgment, one elected city councilman and several appointed commissioners and committee members lived in the annexed area; city schools served the children in the annexed area; the city had expended $90,000 (some of which was donated) for a comprehensive development plan for the newly annexed territory; the city provided police and fire protection to the annexed area; the city provided ambulance service for the annexed area; refuse collection and animal control services were extended; and the city library services were open to residents of the annexed area. The company disputes none of these facts, except to say that some services were initiated before the annexation or after the commencement of the litigation.[32] We hold that the trial court did not err in finding that the City of Valdez exercised sufficient municipal powers under the annexation order in the annexed area to satisfy the doctrine of de facto incorporation.

We conclude that the commission's failure to promulgate standards, the only error we find at the administrative level of these proceedings, renders the annexation voidable; timely attack before the city had exercised its municipal powers under the annexation order would have led to the same result as *Nome*—disannexation.[33] However, the doctrine of de facto municipal incorporation insulates from collateral attack annexations not impeccably effected where the annexation is attempted under a proper statute, a good faith effort is made to comply with the statute, the statute is colorably complied with, and the municipality has exercised its powers in good faith within the annexed territory. The first two elements of this test are incontestible here, and we hold that the decision of the superior court that the other two are satisfied was not in error under the facts of this case. The company's attack upon the Valdez annexation therefore must fail, and the judgment of the superior court must be affirmed.[34]

Affirmed.

ERWIN, J., not participating.

31. We note, however, that failure to hold an election or otherwise obtain popular approval where constitutionally or statutorily required has been held to be a material error. Peterson v. Bountiful City, 25 Utah 2d 126, 477 P.2d 153, 155 (1970); Barton v. Stuckey, 121 Okl. 226, 248 P. 592 (1926).

32. The expenditure of $90,000, refuse and animal control activities and the election and appointment of officials all occurred after the annexation and before the filing of this lawsuit. The company has not pressed an argument that services rendered between the filing of the lawsuit and the motion for summary judgment cannot be considered, and we do not decide the issue. The rendition of services during such litigious interstices in the life of the polity emphasizes the necessity of expeditious judicial *post hoc* review of annexations. It is unfair that citizens of the annexed territory should suffer interruption of services because someone files a lawsuit; it is unfair to the challenger to allow the municipality to enhance its position during the pendency of litigation; it is unfair to the municipality to require expenditure of revenues in a territory which may be severed. Challenges to annexations should therefore be filed promptly, before the ship of state is forced to sail between this Scylla and Charybdis.

33. In *Nome*, the annexation was challenged within two months of its effective date. The corresponding interval here was one year and nine months. There was no evidence in *Nome* that the city had exercised any municipal powers in the annexed area.

34. In view of our holding, we need not consider the defense of laches.

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534 P.2d 91 Abrams v. State

Harold S. ABRAMS et. al., Appellants,

v.

STATE of Alaska et. al., Appellees,

v.

Lee B. JORDAN, Mayor of the Second Class Borough in the Eagle River-Chugiak Area, et al., Appellees.

Lee B. JORDAN, Mayor of the Second Class Borough in the Eagle River-Chugiak Area, et al., Cross-Appellants,

v.

Harold S. ABRAMS et. al., Cross-Appellees.

Nos. 2407, 2418.
Supreme Court of Alaska.
April 15, 1975

Harold S. ABRAMS et al., Appellants,

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Nos. 2407, 2418.

Supreme Court of Alaska.

April 15, 1975.

Action was instituted to determine validity of formation of the Eagle River-Chugiak Borough. The Superior Court, Third Judicial District, Anchorage District, Eben H. Lewis, J., upheld validity of the borough and appeal was taken. The Supreme Court, Connor, J., held that statute pertaining to the organization of the Eagle River-Chugiak Borough was special and local in nature; that nothing in nature of the Eagle River-Chugiak area justified departure from general law scheme of incorporating new boroughs and, therefore, the statute pertaining to creation of the borough contravened constitutional prohibition against passage of local or special acts when a general act can be made applicable; and that constitutional provision requiring division of state into boroughs did not grant power to enact special and local laws creating boroughs notwithstanding the prohibition against passage of local or special acts.

Reversed and remanded.

Erwin and Fitzgerald, JJ., did not participate.

1. Statutes ⇐77(1)

Legislative act may affect only one of a few areas and yet relate to a matter of statewide concern and common interest and, thus, not constitute a local or special act within constitutional prohibition against such acts. Const. art. 2, § 19.

2. Statutes ⇐77(1)

In determining whether a legislative act is a local or special act within constitutional prohibition against such acts, ultimate question is whether the act is reasonably related to a matter of common interest to the whole state. Const. art. 2, § 19.

3. Statutes ⇐76(2)

Statute pertaining to organization of Eagle River-Chugiak Borough constituted both special and local legislation within constitutional prohibition against passage of local or special acts if a general act can be made applicable. Laws 1974, c. 145; AS 29.18.030 et seq.; Const. art. 2, § 19.

4. Statutes ⇐76(2)

Nothing in nature of Eagle River-Chugiak area justified departure from general law scheme of incorporating new boroughs; thus, special and local legislation pertaining to organization of the Eagle River-Chugiak Borough violated constitutional prohibition against passage of a local or special act when a general act can be made applicable. Laws 1974, c. 145; AS 29.18.030 et seq.; Const. art. 2, § 19.

5. Statutes ⇐76(2)

Constitutional provision requiring division of state into boroughs and giving legislature broad power over methods by which boroughs may be organized, incorporated or dissolved did not empower legislature to enact special or local laws pertaining to organization of boroughs despite constitutional prohibition against passage of local and special acts when general acts can be made applicable. Laws 1974, c. 145; AS 29.18.030 et seq.; Const. art. 2, § 19; art. 10, § 3.

6. Statutes ⇐76(1)

Constitutional prohibition against enactment of a local or special act if a general act can be made applicable governs exercise of all legislative powers expressly granted by other portions of the Constitution. Const. art. 2, § 19.

7. Constitutional Law ⇐15

Different provisions of Constitution should be read so as to avoid conflict whenever possible.

George A. Dickson & John Hedland, David Engles of Rice, Hoppner, Blair & Hedland, Anchorage, for appellants in 2407.

Gerald L. Sharp, City-Borough Atty., Juneau, amicus curiae for appellants in No. 2407.

William F. Tull, Palmer, amicus curiae on behalf of Mat-Su Borough.

John Ken Norman & Gary Thurlow, Anchorage, amicus curiae on behalf of Greater Anchorage Area Borough.

Charles Cranston & Vernon L. Snow, of Gallagher, Snow & Cranston, Anchorage, for appellees in 2407; Cross-Appellants in 2418.

Peter Argetsinger, Asst. Atty. Gen., Anchorage, Avrum Gross, Atty. Gen., Juneau, for State of Alaska.

OPINION

Before RABINOWITZ, C. J., CONNOR and BOOCHEVER, JJ., and DIMOND, J. Pro Tem.

CONNOR, Justice.

This appeal and cross-appeal present the question of whether the formation of the Eagle River-Chugiak Borough was validly accomplished under the Alaska Constitution. At the center of the conflict are two constitutional provisions:

> "The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination. Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of the qualified voters voting thereon in the subdivision affected." Alaska Const., art. II, § 19.

> "The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible. The legislature shall classify boroughs and prescribe their powers and functions. Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law." Alaska Const., art. X, § 3.

Appellants assert that the prohibition against local or special acts renders invalid Ch. 145 SLA 1974 by which the Eagle River-Chugiak Borough was organized. They argue that the legislature created a borough by a local or special law when a general law could have been made applicable, and that the "general law" constitutional provision controls the operation of legislative power under art. X, § 3, of the Alaska Constitution. They conclude, therefore, that Ch. 145 SLA 1974 is unconstitutional and that the borough created by the legislature is invalid.

Appellees support the validity of the borough by arguing that the legislative act was not local or special legislation, that even if it was local or special legislation the constitutional prohibition does not apply because a general law cannot be made applicable to the particular subject matter of the legislative act, and that the legislature possesses independent power under art. X, § 3, of the Alaska Constitution, apart from the provisions of art. II, § 19, to create the Eagle River-Chugiak Borough.

I.

The Eagle River-Chugiak area extends from the northeast limits of the City of Anchorage to the Knik River Bridge, and comprises about 738 square miles, slightly less than one-half of the total area of the Greater Anchorage Area Borough as it previously existed. It is located wholly within what was the Greater Anchorage

Area Borough. The area has a population of about 8,500 persons, about 2,500 of whom live in what is regarded as the community of Eagle River. There are no cit- Eagle River lies about 3.7 miles from the ies of any statutory class within the area. corporate limits of the City of Anchorage and about 13 miles from downtown Anchorage. The area is largely residential in land use and most of its work force is employed within what has been the Greater Anchorage Area Borough.

In 1974 the legislature passed Ch. 145 SLA 1974, which became law without the governor's approval. The act provided for an election concurrent with the next statewide election following its passage, to be conducted solely within the Eagle River-Chugiak area, on the question of whether the area should be incorporated as a second class borough. If a majority voted "no" in the first election, the act provided for a subsequent election in which the voters would decide whether the area should be incorporated as a second class city. The election on borough incorporation took place on August 27, 1974, and the proposition passed by a vote of 1,233 to 979. Under the terms of the act, the area then became incorporated.

The act required the Local Boundary Commission to hold a public hearing before the election, and to review the boundaries set forth in the act after the election. Additionally, the Commission was required to promulgate a plan of apportionment, after which the Lieutenant Governor was required to, and did, on December 3, 1974, conduct an election for municipal officers.[1]

Prior to the enactment of Ch. 145 SLA 1974 there existed, and still exists, a comprehensive statutory system for the incorporation of boroughs, including those to be established within the boundaries of boroughs already in existence.[2] The general law scheme for organizing a borough consists of a petition to the Department of Community and Regional Affairs, a review of that petition for form by the Department, public hearings by the Local Boundary Commission, and a decision by the Commission as to whether the standards set out in the statutes have been met. In the event of favorable Commission action, an election can be held within the area proposed for incorporation. When a new borough is to be created within an existing one, both a new incorporation and a change in existing boundaries must occur, and the action must be approved at an election within the new borough. The action may also be conditioned upon electoral approval within the existing borough, and it must be submitted to the legislature.

Appellants brought an action on October 30, 1974, seeking to have Ch. 145 SLA 1974 declared unconstitutional and void and seeking to have enforcement of that statute enjoined. On November 22, 1974, appellants sought a preliminary injunction against conducting the election for municipal officers which was scheduled for December 3, 1974. On November 27, 1974, the superior court entered a temporary restraining order which allowed the election to proceed but prohibited certification of the results pending a further hearing. That further hearing was held on Decem-

1. Other transitional steps include a determination by the Local Boundary Commission, subject to judicial review, of the allocation of debts and assets between the new borough and the Greater Anchorage Area Borough, and written notice by the new borough of its intention to assume its powers. These steps have not been taken, but the act requires that the new borough assume its powers no later than the end of the current fiscal year, i. e., June 30, 1975. In the meantime the Greater Anchorage Area Borough must continue to assess and collect taxes in the new borough until that date, and allocate to the new borough an amount to be determined by the Local Boundary Commission, subject to judicial review. Under the act the Greater Anchorage Area Borough has been prohibited from transferring assets or authorizing bonded indebtedness in the new borough since September 12, 1974.

2. *See* AS 29.18.030 et seq.

ber 20, 1974. On December 20, 1974, oral argument was presented to the superior court, and that court entered a declaratory judgment to the effect that Ch. 145 SLA 1974 was local and special legislation, but was not violative of art. II, § 19, of the Alaska Constitution. Appellants filed this appeal on December 23, 1974, and were granted a stay pending the decision of the appeal. This court also entered an order expediting the appeal because the questions presented obviously should be decided promptly for the benefit of the affected governmental entities and the public.

II.

[1] The first question is whether Ch. 145 SLA 1974 is a local or special act. Our previous opinions in Boucher v. Engstrom, 528 P.2d 456 (Alaska 1974), and Walters v. Cease, 394 P.2d 670 (Alaska 1964), provide background for the resolution of this question. In Walters v. Cease, we held that the Mandatory Borough Act, Ch. 52 SLA 1963, was local and special legislation, and that it could not constitutionally be submitted to the voters for adoption by referendum.[3] In Boucher v. Engstrom, we held that an initiative to relocate the state capital did not amount to special or local legislation, and thus could be placed upon the ballot. We observed that legislation does not become "local" merely because it operates only on a limited number of geographical areas rather than on a statewide geographical basis. A legislative act may affect only one of a few areas and yet relate to a matter of statewide concern or common interest. Boucher v. Engstrom, *supra,* 528 P.2d at 461–62.

[2] Boucher v. Engstrom does represent a retrenchment on the definition of "local" found in Walters v. Cease. But the ultimate question is whether a legislative act, attacked as "local" or "special", is reasonably related to a matter of common interest to the whole state.[4]

[3] In the case at bar it appears that Ch. 145 SLA 1974 is both special and local legislation. The act provides a method of creating a new borough which is peculiar to the locality where it is applicable. The subject matter can hardly be said to be of statewide interest or impact.

Specifically, the operation and scope of the act are limited to the Greater Anchorage Area Borough. The act creates law which affects only the governmental structure of the Greater Anchorage Area Borough and the Eagle River-Chugiak area lying within it. It can have no effect upon any other part of the state. It purports to create a new local government, and does so without regard to the general statutory provisions that prescribe the method that otherwise governs the creation of new local governmental entities from existing ones. In our opinion the legislation is clearly special and local in nature.

III.

[4] This brings us to the next question. Appellees argue that even if Ch. 145 SLA 1974 is a local or special act, it is permissible legislation. The Alaska Constitution forbids local or special acts only "if a general act can be made applicable." Whether a general act can be made applicable is subject to judicial determination. We find AS 29.18.030 et seq. to be an applicable general law.

Appellees argue that the Eagle River-Chugiak area is unique and that this justifies the special treatment given to it by the legislature. The trial court found that the

3. Alaska Constitution, art. XI, § 7, provides: "The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety."

4. Boucher v. Engstrom, 528 P.2d 456, 463 (Alaska 1974).

Eagle River area has a separate identity, that it has been a distinct community in the Anchorage bowl, and that it is the only large "exurban" community in Alaska. Appellees point out additionally that the area is separated from the rest of the Greater Anchorage Area Borough by the Chugach Mountains, the Chugach State Park, and by military reservations. A majority of the electorate of the area has voted against a unified Greater Anchorage Area Borough and against extension of areawide power by the borough over the area.

We do not find this justification persuasive. Numerous other localities within organized boroughs can also claim to be unique in certain respects. Examples come readily to mind.

Douglas, with a 1970 population of 1,243, located on an island across from the state capital, can claim to be distinct, providing a largely residential community for persons working in the capital city. Historically Douglas was a city proudly separate from Juneau. Similarly, it could be claimed that College, with a 1970 population of 3,434, is the only community surrounding the central state university. Nearly every neighborhood or locality within an existing borough can assert some peculiarity or characteristic which distinguishes it from the rest of the borough. If this is all that is needed to justify a departure from general law, then the legislature could, by special act, create many new boroughs out of old ones on an ad hoc basis. We do not think this is what the framers of our constitution intended.[5]

We find nothing in the nature of the Eagle River-Chugiak area which justifies a departure from the general law scheme of incorporating a new borough. Those unusual aspects which appellees have ascribed to the area present no insurmountable barriers to creating a new borough by following the procedures set forth in AS 29.18.-030 et seq. Therefore, we hold that Ch. 145 SLA 1974 contravenes the provisions of art. II. § 19, of the Alaska Constitution.

IV.

[5] Finally, appellees urge that under Art. X, § 3, of the Alaska Constitution the legislature is given broad power over the methods by which boroughs may be organized, incorporated, or dissolved. From this, it is argued, the legislature derives power to enact such laws as Ch. 145 SLA 1974 despite the prohibition of art. II, § 19, of the Alaska Constitution.

[6] But Art. II, § 19, governs the exercise of all legislative powers expressly granted by other portions of the constitution. There is no intimation in its language or in the articles concerning local government which would create an exception to this prohibition against local or special laws.

[7] It is an undisputed maxim of constitutional construction that different provisions of the document shall be read so as to avoid conflict whenever possible. Thus, "[w]henever possible, all provisions should be given effect, and each interpreted in light of the others, so as to reconcile them, if possible, and to render none nugatory." Lemon v. Bossier Parish School Board, 240 F.Supp. 743, 744 (W.D.La.1965).[6] We have carefully read the debates and discussions during Alaska's constitutional convention as they relate to the import of art.

5. *Accord*, State v. Hodgson, 183 Kan. 272, 326 P.2d 752, 762 (1958); *see also* Albuquerque Met. Arroyo Flood Control Authority v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

6. *Accord*, People v. Western Air Lines, 42 Cal.2d 621, 268 P.2d 723, 732 (1954), appeal dismissed, 348 U.S. 859, 75 S.Ct. 87, 99 L.Ed. 677; Cooper Motors v. Board of County Commissioners, 131 Colo. 78, 279 P.2d 685, 688 (1955); Latting v. Cordell, 197 Okl. 369, 172 P.2d 397, 399 (1946).

II, § 19, and art. X.[7] We find nothing in these discussions which would indicate that art. X, § 3, was intended to operate as an exception to the "general law" rule of art. II, § 19. Indeed, if every grant of power were read as an exception to the "general law" provision, that provision would be rendered wholly nugatory in its effect.

We conclude that nothing in the local government articles of the Alaska Constitution overrides the prohibition of art. II, § 19.

Having found the questioned act invalid, we reverse the judgment below and remand for the entry of a judgment in favor of appellants.

7. *See* Const.Conv.Min. pp. 1760–70, 1774, 1824–27, 2768–71 (Jan. 10–25, 1956).

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637 P.2d 1045, Pavlik v. State, Dept. of Community and Regional Affairs, (Alaska 1981)

Michael J. PAVLIK, Jennie L. Pavlik, John Pavlik, Andrew Pavlik, Rudy Pavlik, Paul Pavlik, Steve Younger, Genevieve Younger, Homer Ogle, Neva Ogle, George Ogle, and Anna Johnson,
Appellants,

v.

STATE of Alaska, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, Local Boundary Commission, and the City of Yakutat, a municipal corporation,
Appellees.
The CITY OF YAKUTAT, Cross-Appellant,

v.

Michael J. PAVLIK, Jennie L. Pavlik, John Pavlik, Andrew Pavlik, Rudy Pavlik, Paul Pavlik, Steve Younger, Genevieve Younger, Homer Ogle, Neva Ogle, George Ogle, and Anna Johnson,
Cross-Appellees.

Nos. 4961, 4979.
Supreme Court of Alaska.
Dec. 18, 1981.

Michael J. PAVLIK, Jennie L. Pavlik, John Pavlik, Andrew Pavlik, Rudy Pavlik, Paul Pavlik, Steve Younger, Genevieve Younger, Homer Ogle, Neva Ogle, George Ogle, and Anna Johnson, Appellants,

v.

STATE of Alaska, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, Local Boundary Commission, and the City of Yakutat, a municipal corporation, Appellees.

The CITY OF YAKUTAT, Cross-Appellant,

v.

Michael J. PAVLIK, Jennie L. Pavlik, John Pavlik, Andrew Pavlik, Rudy Pavlik, Paul Pavlik, Steve Younger, Genevieve Younger, Homer Ogle, Neva Ogle, George Ogle, and Anna Johnson, Cross-Appellees.

Nos. 4961, 4979.

Supreme Court of Alaska.

Dec. 18, 1981.

Landowners brought action against state, local boundary commission, and city challenging annexation of their land by city. The Superior Court, Juneau County, Thomas B. Stewart, J., entered summary judgment for defendants on basis of laches and equitable estoppel. Landowners appealed, and city cross-appealed from denial of its request for attorney fees. The Supreme Court, Connor, J., held that: (1) in light of delay of two years and eight months in filing suit after first notice of annexation and of prejudice to city, commission, and state arising from such delay, laches precluded landowners from asserting their claim, and (2) denial of city's request for attorney fees was not manifestly unreasonable.

Affirmed.

Dimond, Senior Justice, dissented and filed opinion in which Matthews, J., joined.

1. Appeal and Error ⇐1008.1(8)

Trial court's decision that an action is barred by laches will not be overturned unless the reviewing court has a firm and definite conviction that a mistake has been committed.

2. Appeal and Error ⇐1008.1(5)

A trial judge's findings will not be overturned as "clearly erroneous" unless reviewing court has a firm and definite conviction that a mistake has been committed.

3. Equity ⇐72(1)

A laches analysis requires trial court to determine whether there was an unreasonable delay in seeking relief and a resulting prejudice to defendant as a result of delay.

4. Equity ⇐72(1)

Whether laches exists is determined in part by balancing length of a plaintiff's delay in bringing suit against severity of prejudice resulting to defendant.

5. Equity ⇐71(2)

Laches is essentially a matter of balancing the equities of a particular case to determine whether plaintiffs are guilty of inequitable delay.

6. Municipal Corporations ⇐33(9)

In light of landowners' delay of two years and eight months following notice of annexation in filing suit challenging annexation and of prejudicial effects to local boundary commission and city if suit were allowed to be maintained, laches precluded landowners from asserting claim.

7. Municipal Corporations ⇐33(9)

In action challenging annexation, trial court did not err in denying city's request for attorney fees on grounds that situation that landowners were put to by lack of notice was enough to suggest that public generally ought to bear burden of their attempt to contest it.

James F. Petersen, Juneau, for appellants/cross-appellees.

Rodger W. Pegues, Asst. Atty. Gen. and Avrum M. Gross, Atty. Gen., Juneau, for appellee State of Alaska.

Patrick M. Anderson, Hedland, Fleischer & Friedman, Anchorage, for appellee/cross-appellant City of Yakutat.

Before RABINOWITZ, C. J., CONNOR, BURKE, and MATTHEWS, JJ., and DIMOND, Senior Justice.*

OPINION

CONNOR, Justice.

This appeal arises from an action challenging the annexation of land to the City of Yakutat. The superior court entered summary judgment for the defendants on the basis of laches and equitable estoppel. We affirm.

On October 8, 1973, the City of Yakutat petitioned the Local Boundary Commission to annex certain adjacent land.[1] On May 23, 1975, the commission held a properly noticed hearing[2] on the petition. The area in which the twelve appellants live was not originally part of the land considered for annexation. These landowners and residents, therefore, did not attend the hearing.[3] At the hearing it was proposed for the first time that the annexation petition be amended to include a larger area of land, which in part included appellants' property. The commission could have discontinued its proceedings at that time and notified the owners and residents of the additional area, which would include appellants, of the proposed annexation of their land, so that a new hearing could have been held, at which the owners and residents could have expressed their views on the annexation.[4] In-

* Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 16 of the Constitution of Alaska.

1. The annexation was initiated by state action, pursuant to article X, section 12, of the Alaska Constitution and AS 44.19.260, rather than by local action. The governing regulations, therefore, are those set forth in 19 AAC 10.010–.180.

2. 19 AAC 10.090, which requires notice and a hearing, provides:

> "The commission shall determine the time and place of the hearing which shall be held in or near the territory. At least fifteen days prior to the date of the hearing, the commissioner shall cause notice of the hearing to be given and served by certified mail upon:
> (1) all municipalities specified at sec. 60 of this chapter; and
> (2) any person or municipality who has filed an answering brief pursuant to sec. 100 of this chapter."

See 19 AAC 10.130.

Although the regulations call for a hearing, it is of interest that the regulations also provide for a self-executing waiver of procedural defects:

> "Compliance with the regulations of this chapter may be waived by the commission if substantial rights of interested parties are not prejudiced by such waiver. Any deviation from the procedures set forth in this chapter is waived by the commission unless the commission or a party objects."

19 AAC 10.150.

3. The owners of the property being considered for annexation under the original petition were alerted to the proceedings by the notice given of the petition. 19 AAC 10.080, which requires this notice, states in relevant part:

> "Upon receipt of notice from the department that the petition and brief have been accepted, the petitioner shall cause notice of the filing of the petition to be published in a newspaper of general circulation in the territory. Such notice shall be in the form specified by the Commissioner of the Department of Community and Regional Affairs and shall include a brief explanation of the proposed boundary change, the name of the petitioner, the name of each municipality whose boundaries are to be changed, and shall indicate the place where the petition and brief may be inspected by the public as provided in sec. 60 of this chapter."

Yakutat does not have its own newspaper and notices of the petition were therefore posted in several prominent places in the city. Appellants knew of the posted notices, but because the original petition did not involve their property, they had no reason to be concerned about the annexation proceedings or attend the commisson's hearing.

4. The regulations do not provide for the amendment of a petition for annexation and the proper procedures, therefore, are not entirely clear. It seems evident, however, that the commission should have held a new hearing after the proposed amendment because the purpose of the notice and hearing requirement of 19 AAC 10.090 is to permit interested persons to express their views on the annexation. 19 AAC 10.130(d) states that at the hearing "the commission will hear the views of all or any interested persons or political subdivision...." The

stead, the commission reconvened for a decisional meeting shortly after the hearing, and approved the annexation as amended. A formal decision to this effect was entered on January 12, 1976. The commission's recommendation for the annexation was presented to the Alaska legislature on January 19, 1976. No resolution of disapproval was introduced in the legislature and, therefore, the annexation became effective on March 4, 1976.[5]

On November 3, 1978, two years and eight months after the annexation became effective, appellants filed suit against the State of Alaska, the Local Boundary Commission, and the City of Yakutat. They claimed that the commission's failure to provide them with notice and a hearing on the annexation of their land to the City of Yakutat violated the due process clauses of the Alaska and United States Constitutions, as well as certain state laws and regulations. Appellants requested the superior court to set aside the annexation of all lands beyond those indicated in the commission's original petition.[6]

All parties moved for summary judgment. The superior court granted appellees' motion, invoking the doctrines of laches and equitable estoppel to bar the appellants' action. The parties were ordered to bear their own costs and attorney's fees. The landowners and residents appeal and, in addition, argue that their own motion for summary judgment should have been granted. The City of Yakutat cross-appeals from the denial of its request for attorney's fees.

I

[1, 2] We first consider whether the superior court erred in granting summary judgment for the commission, state and city on the basis of laches. The facts are not in dispute and thus we need only examine whether appellees were entitled to judgment as a matter of law. *See* Alaska R.Civ.P. 56. We will not overturn a trial court's decision that an action is barred by laches unless we have a firm and definite conviction that a mistake has been committed. *Young v. Williams*, 583 P.2d 201, 204 (Alaska 1978). As stated in *Moore v. State*, 553 P.2d 8, 15 (Alaska 1976):

> "The decision to sustain a defense based on laches is properly addressed to the discretion of the trial court, and will not be overturned unless we feel a definite and firm conviction that a mistake has been committed."

This is the same test used to determine whether a trial judge's findings are "clearly erroneous." *Id.* at 15, n.3.

[3, 4] A laches analysis requires the trial court to make two determinations in deciding the effect of a delay in bringing suit. The court must find both an unreasonable delay in seeking relief and a resulting prejudice to the defendant as a result of the delay. *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 457 (Alaska 1974). Consequently, whether laches exists is determined in part by balancing the length of a plaintiff's delay in bringing suit against the severity of the prejudice resulting to the defendant. As we stated in *Concerned Citizens*:

> "No specific time must elapse before the defense of laches can be raised because the propriety of refusing to hear a claim turns as much upon the gravity of

commission cannot do this if the owners and residents of affected land are not notified of the hearing.

5. Using identical language, both the Alaska Constitution, article X, section 12, and AS 29.-68.010 provide that a proposed boundary change "shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house."

6. After this lawsuit was filed the commission moved, in January, 1979, to reconsider the city's boundaries. It reheard the matter and gave appellants the opportunity to be heard. The commission thereafter reaffirmed its earlier decision to annex that area encompassing appellants' land. Because we dispose of this appeal based on laches, it is unnecessary to resolve whether this second hearing cured the initial procedural defect surrounding the original hearing.

the prejudice suffered by the defendant as the length of the plaintiff's delay." *Id.* at 457. Thus, where there is a long delay, a lesser degree of prejudice will be required.[7]

In this case, the landowners were alerted that their property had been annexed shortly after March, 1976, the effective date of the annexation. They realized at that time that they had not been notified of any hearing concerning annexation of their property. Yet the landowners did not file their complaint until November of 1978, fully two years and eight months after they knew of the annexation. We agree with the superior court that this delay was unreasonable.[8]

Although the question of prejudice to the appellees presents a somewhat close question standing alone, when viewed in light of the appellants' extensive delay in filing this action, we are of the opinion that the prejudice is adequate to support the trial court's application of laches. The trial court relied upon several factors in concluding that appellants' delay resulted in prejudice. First, it found that some of the appellants had voted in city elections, which they were entitled to do only because they were residents of the city following the annexation. The court believed that setting aside the annexation could affect these elections, a conclusion about which we express no opinion. Second, one of the appellants had become a member of the city's planning and zoning commission, again a position that could only be held by a resident of the city. The trial court concluded that if the annexation were set aside, this party's vote would have to be discounted on all matters heard by the commission while a member, and that this might affect some of the commission's decisions, again a conclusion about which we express no opinion. Third, the court concluded that setting aside the annexation would require the city to refund the taxes it had assessed and collected on the annexed property. Finally, the court found that, while "no great extent of services" were provided, police and fire protection had been available since the annexation. These prejudicial effects of the delay are in line with those we mentioned in *Concerned Citizens* and in *Port Valdez Co. v. City of Valdez*, 522 P.2d 1147, 1153 (Alaska 1974).

[5] Laches is essentially a matter of "balancing the equities of a particular case to determine whether plaintiffs are guilty of inequitable delay." *Moore v. State*, 553 P.2d 8, 19 (Alaska 1976). In striking that balance in the case at bar, we think significant weight should be accorded appellants' acquiescence in the annexation of that area in which they reside. Appellants voted in city elections; they paid property taxes; they requested and received favorable zoning; one of the appellants became a member of the planning and zoning commission; another sent a child to school in the city without paying the tuition required of nonresidents. Given the fact that the city suffered some prejudice and that of appellants' acquiescence, we cannot arrive at a "definite and firm conviction that a mistake has been committed" by the superior court in balancing the equities. *See Young*, 583 P.2d at 204; *Concerned Citizens*, 527 P.2d at 457.

[6] Thus we affirm the superior court's conclusion that laches precludes appellants from asserting their claim.[9] In view of this

7. We have alluded to this interdependence between the elements of delay and prejudice in numerous prior opinions. *See Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758, 767 (Alaska 1977); *Moore v. State*, 553 P.2d 8, 15–16 (Alaska 1976); *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 457 (Alaska 1974).

8. It is interesting to note that AS 29.18.150 sets a six-month statute of limitations on private actions pursuing the analogous issue of challenging a municipality's incorporation.

9. We reject appellants' argument that the trial court erred in not considering the public interest assertedly imbuing their position. *See Moore v. State*, 553 P.2d 8 (Alaska 1976). Appellants argue that the public interest in their action is important enough that, when balanced with the other factors considered by the trial court, it would tip the scales in their favor. We disagree. The interest they claim their action

disposition, we need not reach the other arguments advanced on appeal.[10]

II

[7] On cross-appeal the City of Yakutat argues that the superior court abused its discretion by failing to award the city its attorney's fees. Civil Rule 82(a)(1) provides that absent a monetary recovery, "attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount." We will not reverse the superior court's decision unless it is manifestly unreasonable. *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979); *Palfy v. Rice*, 473 P.2d 606, 613 (Alaska 1970).

The superior court denied the city's request for attorney's fees on the ground that "the situation that these plaintiffs were put to by the lack of notice was enough to suggest that the public generally ought to bear the burden of their attempt to contest it." We do not believe this reasoning is manifestly unreasonable. Therefore, we affirm the court's decision.

The judgment is AFFIRMED.

involves is the interest the public has in the vindication of a constitutional right, which in this case is the asserted right to notice and hearing before one's property is annexed. The trial court concluded that there is no constitutional right to notice and a hearing in annexation proceedings. Even assuming that there is such a right, a question we do not reach, in the present annexation context the appellants are not asserting any interest of the public at large. In challenging the annexation, the appellants are merely asserting their private interests as owners of private property. Not every suit against the government is infused with a public interest, and characterizing their attack as constitutional does not change that principle. Even if the suit did involve a public interest advanced by the appellants, it would not compel an exception to the bar of laches. A public interest, if it exists, is but one factor to balance among the overall equities in deciding the laches issue.

10. Appellants argue that the government should never be permitted to invoke laches to bar an action that protects the public interest, relying upon *George v. Arizona Corp. Comm'n*, 83 Ariz. 387, 322 P.2d 369, 372 (1958). Appellants, however, misconstrue *George*. The rule adopted there is that when the state brings an action that involves its governmental functions, the defendant cannot invoke laches to bar the action. This is nearly the opposite of the principle suggested and provides no authority for appellants' argument. Further, we rejected their argument in *Moore*, where we stated that "we cannot agree . . . that laches should never be applied when the 'public interest' is at stake." 553 P.2d at 19.

DIMOND, Senior Justice, joined by MATTHEWS, Justice, dissenting.

I agree with the majority's holding that the appellants' delay in bringing this action—two years and eight months after they knew of the annexation—was unreasonable. But I disagree with the holding that the prejudice to the City of Yakutat is adequate to support the superior court's application of laches so as to bar the relief appellants seek.

The superior court found that some of the appellants voted in city elections, which they were entitled to do only because they were residents of the city after the annexation. The court believed that setting aside the annexation could affect those elections. I believe that here the superior court was mistaken. Yakutat City Ordinance 4.36.020 provides that if an election is not challenged within ten days of when the results are declared the election results "shall be conclusive, final and valid in all respects."[1] By its own ordinance, therefore, Yakutat's elections cannot be affected if a contest is not initiated within approximately ten days of the election. There is no means by which the appellants' votes in past elections could now be set aside.

1. This ordinance is similar to AS 29.28.050(e), which governs when a municipality does not enact its own ordinance on the subject. AS 29.28.050(e) provides, in part, as follows:

> No person may appeal or seek judicial review of a city or borough election for any cause or reason unless the person . . . has commenced, within 10 days after the assembly or council has finally declared the election results, an action in the superior court in the judicial district in which the municipality is located. If no such action is commenced within the 10-day period, the election and election results shall be conclusive, final and valid in all respects.

The superior court found that one of the appellants had become a member of the city's Planning and Zoning Commission, which was a position that could only be held by a resident of the city. The court concluded that if the annexation were set aside this appellant's vote would have to be discounted on all matters heard by the Commission while she was a member, and that this would probably affect some of the Commission's decisions. This, the court found, would be another item of prejudice to the city that would call for the application of laches so as to bar the relief sought by appellants.

I believe that the superior court was mistaken in reaching this conclusion. If the annexation were set aside, the appellant who sat on the Commission would retrospectively lose her status as a resident of the City of Yakutat, and thus would be retrospectively disqualified to have been a member of the Commission. But the doctrine of "de facto officer" would prevent this from having any effect on the decisions made by the Commission while this appellant was a member.

This doctrine provides that a person who is ineligible to hold a governmental office but assumes the office under color of law is a de facto officer whose official acts cannot be challenged on the basis of the disqualification. As one court stated:

> A person who assumes and performs the duties of a public office under color of authority and is recognized and accepted as the rightful holder of the office by all who deal with him is a *de facto* officer, even though there may be defects in the manner of his appointment, or he was not eligible for the office, or he failed to conform to some condition precedent to assuming the office.

State v. Miller, 222 Kan. 405, 565 P.2d 228, 235 (1977), *quoting Olathe Hospital Foundation, Inc. v. Extendicare, Inc.*, 217 Kan. 546, 539 P.2d 1 (1975).

The Georgia Supreme Court explained the doctrine, stating:

> Although a person may be absolutely ineligible to hold any civil office whatever in this state, yet his official acts, while holding a commission as a public officer, are valid as the acts of an officer de facto.

Health Facility Investments, Inc. v. Georgia Department of Human Resources, 238 Ga. 383, 233 S.E.2d 351 (1977), *quoting Wright v. State*, 124 Ga. 84, 52 S.E. 146 (1905).

In this case, the appellant who sat on the Commission took office under color of law. Everyone involved believed that she was eligible to sit on the Commission and everyone acted as though she were a proper member. I believe that, under these facts, if the annexation were set aside the appellant would be a de facto officer. Setting aside the annexation would not affect the validity of the Commission's decisions.

As another reason for applying the doctrine of laches, the superior court found that, while "no great extent of services" was provided, police and fire protection had been available since the annexation.

The mere fact that municipal services, such as police and fire protection, have been available to the appellants since the annexation of their land does not constitute the type of prejudice necessary to support a finding of laches. The typical prejudice resulting to a city from a belated attack upon an annexation is that the city has already extended substantial services to the annexed area, such as making street improvements, supplying water and electricity, and installing sewer systems, sidewalks and curbing. *See Alexander v. Trustees of Village of Middleton*, 92 Idaho 823, 452 P.2d 50, 52–54 (1969); *Finucane v. Village of Hayden*, 86 Idaho 199, 384 P.2d 236, 240 (1963). No services of this nature were provided to the area in which appellants live.

Finally, the superior court applied the doctrine of laches because to set aside the annexation would require the City of Yakutat to refund taxes that it had assessed and collected on the annexed property.[2] A mu-

2. The superior court and all parties have assumed that if the annexation is set aside Yaku-

nicipality undoubtedly sustains some harm whenever it is required to unexpectedly refund taxes that it has collected. In some circumstances, when a plaintiff unreasonably delays before challenging an annexation, the prejudice that this causes the municipality will be sufficient to justify invoking laches to bar maintenance of the action. Depending upon the size of the area annexed and the tax rate involved, the money collected in property taxes from the area could be substantial. The longer the owners of the area wait before challenging the annexation, the more money the municipality has collected and believes is available for its use. Refunding this money could seriously affect the municipality's financial position. However, in other circumstances, relatively little money could be involved, so that refunding the taxes would not cause any significant harm to the municipality.

The record does not show the amount of taxes involved. In order to ascertain whether the City of Yakutat would suffer such prejudice as to invoke the doctrine of laches against appellants if the city were obliged to refund taxes, a determination would have to be made of the amount of taxes paid by appellants and other owners of the annexed property. I would remand the case for such a determination by the superior court. Then, and only then, can it be decided whether Yakutat would be significantly prejudiced if it had to refund this money to the owners of the annexed property. In the absence of such a finding by the trial court on remand, I believe that the majority is mistaken in holding that laches preclude appellants from asserting their claim.

tat will have to refund the property taxes it collected from the area. We accept this assumption for the purpose of discussion, but express no opinion as to its validity.

David JOHNSON, Petitioner,

v.

Verne E. ROBINSON, Respondent.

No. 5948.

Supreme Court of Alaska.

Dec. 18, 1981.

Forcible entry and detainer action was instituted against possessor of real property. The District Court, Seaborn J. Buckalew, J. pro tem., rendered judgment in claimant's favor, and appeal was taken. The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., affirmed. Possessor's petition for hearing was granted, and the Supreme Court held that possessor had introduced evidence which demonstrated that his claim to title was not a sham, and since he thus attempted to litigate merits of claimant's title, motion to dismiss forcible entry and detainer action should have been granted.

Reversed and remanded with directions.

1. Public Lands ⇐39(1)

Townsite trustee's grant of title can be set aside for fraud, accident, or mistake.

2. Forcible Entry and Detainer ⇐6(2)

Possessor had introduced evidence which demonstrated that his claim to title of subject real property was not a sham, and since possessor thus attempted to litigate merits of claimant's title, his motion to dismiss forcible entry and detainer action should have been granted. AS 09.45.150, 22.15.050.

Richard B. Brown, Faulkner, Banfield, Doogan & Holmes, Anchorage, for petitioner.

Elaine M. Andrews, Lane, Powell, Ruskin, Barker & Hicks, Anchorage, for respondent.

863 P.2d 232, Valleys Borough Support Committee v. Local Boundary Com'n, (Alaska 1993)

VALLEYS BOROUGH SUPPORT COMMITTEE, for itself and on behalf of those certain classes of persons Residents of the Proposed Valleys Borough and the Signatories on the Valleys Petitions, Appellants,

v.

LOCAL BOUNDARY COMMISSION, Appellee.

No. S-5182.
Supreme Court of Alaska.
Nov. 12, 1993.
Rehearing Denied Dec. 2, 1993.

VALLEYS BOROUGH SUPPORT COMMITTEE, for itself and on behalf of those certain classes of persons Residents of the Proposed Valleys Borough and the Signatories on the Valleys Petitions, Appellants,

v.

LOCAL BOUNDARY COMMISSION, Appellee.

No. S–5182.

Supreme Court of Alaska.

Nov. 12, 1993.

Rehearing Denied Dec. 2, 1993.

Borough support committee sought to void incorporation election of borough on grounds that local boundary commission (LBC) had no authority to reject proposed borough petition and to make incorporation of borough contingent on passage of revenue measure. The Superior Court, Fourth Judicial District, Fairbanks, Richard H. Erlich, J., affirmed LBC's decision. Committee appealed. The Supreme Court, Moore, C.J., held that: (1) although LBC made no express finding regarding validity of petition, it impliedly found that petition did not comply with statutory standards for borough incorporation by finding that area within proposed borough was not "cohesive enough at this time to be within same organized borough," and (2) committee was "public interest litigant," and thus, it was not required to pay attorney fees in favor of LBC.

Affirmed.

1. Municipal Corporations ⇐12(9)

Finding of local boundary commission (LBC) that area within proposed borough was not "cohesive enough at this time to be within same organized borough" constituted implied finding that petition to organize land into borough did not comply with statutory standards for borough incorporation, even though LBC made no express finding regarding validity of petition. AS 07.10.030, 29.05.031, 29.05.031(a), (a)(1).

2. Municipal Corporations ⇐12(13)

Borough support committee was "public interest litigant" and was not required to pay attorney fees in favor of local boundary commission (LBC) in litigation seeking to void incorporation election of borough by LBC, where petition represented proposed form of government so it was clearly designed to effectuate strong public policies, hundreds of citizens signed petition, indicating that numerous people would receive benefits from lawsuit, only private party would have been expected to bring suit, and no apparent economic incentive existed to bring lawsuit.

See publication Words and Phrases for other judicial constructions and definitions.

Marc Grober, Nenana, for appellants.

Marjorie L. Odland, Asst. Atty. Gen., and Charles E. Cole, Atty. Gen., Juneau, for appellee.

Before MOORE, C.J., and RABINOWITZ, BURKE, MATTHEWS and COMPTON, JJ.

OPINION

MOORE, Chief Justice.

I. INTRODUCTION

Valleys Borough Support Committee (VBSC) seeks to void the incorporation election of the new Denali Borough on the grounds that the Local Boundary Commission (LBC) had no authority to reject the proposed Valleys Borough petition and that LBC had no authority to make incorporation of the Denali Borough contingent on the passage of a revenue measure. VBSC also appeals the attorney's fee award in favor of LBC, arguing it should not be required to pay attorney's fees because it is a public interest litigant. We affirm, but vacate the attorney's fee award.

II. FACTS AND PROCEEDINGS

This case concerns the borough incorporation of the Denali National Park, Cantwell, McKinley Park and Healy areas. LBC received three petitions to organize this land into a borough. The first, submitted on June 1, 1989 by the Matanuska–Susitna Borough, sought to annex the area. The second, submitted on October 25, 1989, was the Denali petition. It sought to create a new home rule borough. The third, submitted on October 27, 1989, was the Valleys petition. It also sought to create a new home rule borough.

The proposed Valleys and Denali borough petitions concerned essentially the same geographic areas. However, the Valleys petition included the "road system north past Nenana" (i.e., the Greater Nenana area), whereas the Denali petition did not.[1]

In March 1990, LBC conducted seven public hearings on the merits of the competing petitions. In April 1990, LBC held a decisional session. During this session, LBC determined the "ideal" boundaries for a borough in the region, amended and approved the Denali petition, and denied the Valleys and Matanuska–Susitna petitions.

LBC determined that the Denali petition met the constitutional, statutory and regulatory standards for borough incorporation. LBC found the Denali petition superior to the Valleys and Matanuska–Susitna petitions. Specifically, LBC determined that

> [t]he "ideal" boundaries for a borough in the region include the area from the northern boundary of the Matanuska–Susitna Borough to the western boundary of the Fairbanks North Star Borough. This area includes the communities of Cantwell, McKinley Village, Healy, Anderson and Nenana.

Despite this conclusion, LBC also determined that

> [n]otwithstanding the "ideal" boundaries ... the Greater Nenana area and the Denali region are not cohesive enough *at this time* to include both territories within the same *organized* borough.
>
> In reaching this conclusion, the [LBC] stressed that "ideal" boundaries are intended to represent long-term goals with respect to regional government boundaries in Alaska. Further, it may be necessary and appropriate to deviate from these ideal boundaries in the short-term.
>
> In this particular case, the exclusion of the Greater Nenana area from the area proposed for incorporation is found to be warranted in the short-term on the basis of broad judgments of political and social policy. The preponderance of testimony in the Denali region was in strong opposition to the inclusion of Nenana at this time. Opposition stemmed from differences in social, cultural and economic considerations. For example, the Denali and Valleys petitions and testimony demonstrated divergent views among the residents of the two areas concerning means of generating local government revenues and philosophies of government operations.
>
> Thus, there appears to be significant potential that the inclusion of the Greater Nenana area in the Denali Borough might result in the defeat of the incorporation proposition by the voters. Therefore, it was determined to be in the best interests of the State of Alaska and the residents of the Denali region for the Greater Nenana area to be excluded from the proposed Denali Borough.

The superior court affirmed LBC's decision. VBSC now appeals the superior court's ruling.

III. DISCUSSION

A. LBC had authority to reject the Valleys petition.

[1] VBSC argues LBC had no authority to reject the Valleys petition. We disagree. Although LBC made no express finding

1. Moreover, the proposed governmental charters differed significantly. The Valleys charter provided an "automatic referendum" procedure, which would require two-thirds voter approval on any "ordinance which purports to tax or levy, appropriate, contract [or] circumscribe any resident's rights or liberties." The proposed Denali charter contained no such provision.

regarding the validity of the Valleys petition, we conclude LBC impliedly found that the petition did not comply with the statutory standards for borough incorporation.

The statutory standards for home rule, first class and second class borough incorporation are

> (1) the population of the area is interrelated and integrated as to its social, cultural, and economic activities, and is large and stable enough to support borough government;
>
> (2) the boundaries of the proposed borough conform generally to natural geography and include all areas necessary for full development of municipal services;
>
> (3) the economy of the area includes the human and financial resources capable of providing municipal services; evaluation of an area's economy includes land use, property values, total economic base, total personal income, resource and commercial development, anticipated functions, expenses, and income of the proposed borough;
>
> (4) land, water, and air transportation facilities allow the communication and exchange necessary for the development of integrated borough government.

AS 29.05.031(a).

LBC impliedly found that the Valleys petition did not meet the first statutory criterion, AS 29.05.031(a)(1), because LBC found that the area within the proposed Valleys borough was not "cohesive enough *at this time* to [be] within the same *organized* borough."

We previously have observed that

> [a] determination whether an area is cohesive and prosperous enough for local self-government involves broad judgments of political and social policy. The standards for incorporation set out in AS 07.10.030 were intended to be flexibly applied to a wide range of regional conditions. This is evident from such terms as "large enough", "stable enough", "conform generally", "all areas necessary and proper", "necessary or desirable", "adequate level" and the like.[2] The borough concept was incorporated into our constitution in the belief that one unit of local government could be successfully adapted to both urban and sparsely populated areas of Alaska, and the Local Boundary Commission has been given a broad power to decide in the unique circumstances presented by each petition whether borough government is appropriate. Necessarily, this is an exercise of delegated legislative authority to reach basic policy decisions. Accordingly, acceptance of the incorporation petition should be affirmed if we perceive in the record a reasonable basis of support for the Commission's reading of the standards and its evaluation of the evidence.

Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92, 98–99 (Alaska 1974) (footnote omitted) (upholding LBC's determination that the North Slope Borough met the standards for borough incorporation). Applying the reasonable basis standard, we affirm LBC's determination that the proposed Valleys Borough was not cohesive enough for organized borough government.[3]

B. Attorney's Fees

[2] Upon LBC's motion, the superior court awarded LBC attorney's fees in the amount of $750. VBSC argues this award was erroneous, because it is a public interest litigant. We agree.

In *Kenai Lumber Co. v. LeResche*, 646 P.2d 215, 222–23 (Alaska 1982), we set forth the criteria useful in identifying public interest litigants.

> (1) Is the case designed to effectuate strong public policies?

2. AS 07.10.030 contained the former statutory standards for borough incorporation. It has been replaced by AS 29.05.031. The standards set forth in AS 29.05.031 parallel those found under the prior statute and contain similarly flexible language.

3. Given this analysis, we need not address the validity of former Alaska Administrative Code regulations concerning competing petitions and borough incorporations. 19 AAC 10.835; 19 AAC 10.160–10.180. These regulations have been either rewritten or eliminated in the 1992 code revision, effective July 31, 1992.

(2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit?

(3) Can only a private party have been expected to bring the suit?

(4) Would the litigant claiming public interest status have had sufficient economic incentive to bring the lawsuit even if it involved only narrow issues lacking general importance?

Id.

These criteria have been met. Because the Valleys petition represented a proposed form of government, it clearly was designed to effectuate strong public policies. Hundreds of citizens signed the Valleys petition, indicating that numerous people would receive benefits from the lawsuit. Only a private party would have been expected to bring this suit. No apparent economic incentive exists to bring the lawsuit. Consequently, we vacate the attorney's fee award.

IV. CONCLUSION

We affirm the superior court's decision to uphold the incorporation of the Denali Borough. LBC correctly applied the statutory standards for borough incorporation in determining that the Denali petition was superior to the Valleys petition.[4] We vacate the attorney's fee award, because VBSC is a public interest litigant.

AFFIRMED. The attorney's fee award is VACATED.

4. VBSC also challenges LBC's authority to make the Denali Borough incorporation contingent on voter approval of a four percent bed tax. We need not decide this issue. Even if LBC exceeded its authority, this would not entitle VBSC to the remedy it seeks, i.e., voiding the Denali Borough's creation.

Emil BJORNSSON, Appellant,

v.

U.S. DOMINATOR, INC., Appellee.

No. S-5094.

Supreme Court of Alaska.

Nov. 12, 1993.

Fisherman brought suit seeking payment from vessel owner. Summary judgment in favor of vessel owner was entered by the Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, J., and fisherman appealed. The Supreme Court, Burke, J., held that: (1) "lay share" fishermen, who are to be paid percentage of adjusted gross sale value of fish caught, are "seamen" both within federal statute requiring that master and owner of fishing vessel make and sign agreement in writing with every seamen employed before beginning of fishing voyage, and within federal statute declaring that engagement of seamen contrary to law of the United States is void, and providing sanction, and (2) thus, lay share fisherman who did not have written agreement was entitled to recover the amount agreed upon before the voyage, not including disputed conditions to payment, or the highest rate of wages at the port from which he was engaged, whichever was higher.

Reversed and remanded with directions.

1. Appeal and Error ⇐893(1)

Whether Superior Court erred in deciding on summary judgment that fisherman was not entitled to payment until vessel owner received payment for fish sold was reviewed de novo.

2. Seamen ⇐6

Under federal statute, both master and owner of fishing vessel must make and

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885 P.2d 1059, Lake and Peninsula Borough v. Local Boundary Com'n, (Alaska 1994)

LAKE AND PENINSULA BOROUGH, Petitioner,

v.

LOCAL BOUNDARY COMMISSION, State of Alaska and City of Ekwok, et al., Respondents.
CITY OF EKWOK, City of New Stuyahok, City of Clarks Point, Koliganek Village Council, Koliganek Natives, Ltd., Stuyahok Ltd., Ekwok Natives, Ltd., Choggiung, Ltd.,
Aleknagik Natives, Ltd., Manokotak Natives, Ltd., and Saguyak, Ltd., Inc., Cross-Petitioners,

v.

LOCAL BOUNDARY COMMISSION, et al., Cross-Respondents.

Nos. S-5476, S-5485.
Supreme Court of Alaska.
Dec. 2, 1994.

LAKE AND PENINSULA BOROUGH, Petitioner,

v.

LOCAL BOUNDARY COMMISSION, State of Alaska and City of Ekwok, et al., Respondents.

CITY OF EKWOK, City of New Stuyahok, City of Clarks Point, Koliganek Village Council, Koliganek Natives, Ltd., Stuyahok Ltd., Ekwok Natives, Ltd., Choggiung, Ltd., Aleknagik Natives, Ltd., Manokotak Natives, Ltd., and Saguyak, Ltd., Inc., Cross-Petitioners,

v.

LOCAL BOUNDARY COMMISSION, et al., Cross-Respondents.

Nos. S-5476, S-5485.

Supreme Court of Alaska.

Dec. 2, 1994.

Villages within watershed brought action challenging incorporation of borough including watershed. The Superior Court, Third Judicial District, Joan M. Woodward, J., ruled that borough's boundary was voidable and ordered new election if boundary was changed by Local Boundary Commission (LBC), and appeal was taken. The Supreme Court, Compton, J., held that: (1) published notice of filing of petition to incorporate borough and proof of such notice were required to precede published notice of hearing on petition; (2) laches was equitable defense inapplicable to action at law challenging borough's incorporation; and (3) election between no borough or borough excluding watershed, rather than detachment of watershed, was appropriate remedy.

Affirmed in part, reversed in part and remanded.

1. Administrative Law and Procedure ⇐790, 797

Supreme Court reviews both agency's interpretation of its own regulations and agency's exercise of its discretionary authority under "reasonable basis" standard.

2. Administrative Law and Procedure ⇐683

Superior Court decision was not entitled to deference on appeal, where court acted as intermediate appellate court in reviewing agency decision.

3. Municipal Corporations ⇐12(6)

Published notice of filing of petition to incorporate borough and proof of such notice were required to precede published notice of hearing on petition. AS 44.47.573; Alaska Admin. Code tit. 19, §§ 10.370, 10.380 (Repealed).

4. Municipal Corporations ⇐12(6)

Borough's failure to establish colorable compliance with notice provision in connection with incorporation petition made de facto incorporation doctrine inapplicable to borough. AS 44.47.573; Alaska Admin. Code tit. 19, §§ 10.370, 10.380 (Repealed).

5. Municipal Corporations ⇐12(1)

Laches is defense to suits challenging municipal formation; defense requires unreasonable delay by plaintiff resulting in prejudice to defendant.

6. Municipal Corporations ⇐12(1)

Laches was equitable defense inapplicable to action at law challenging borough's incorporation. AS 29.05.100(b).

7. Municipal Corporations ⇐14

After it was determined that borough was incorporated without proper notice, election permitting voters to choose between two boundaries was inappropriate remedy; election permitting voter to choose between two boundaries essentially allowed electorate to establish boundary without regard to Local Boundary Commission's (LBC) action. Const. Art. 10, § 12.

8. Municipal Corporations ⇐14

After it was determined that borough was incorporated without sufficient notice to various villages within watershed, election between no borough or borough excluding watershed, rather than detachment of watershed, was appropriate remedy; prospect that

borough would not be incorporated did not constitute damage to public good outweighing the benefit of remedying notice violations. AS 29.05.031(a)(2); Alaska Admin. Code tit. 19, § 10.230(a)(2).

Bruce E. Falconer, Hicks, Boyd, Chandler & Falconer, Anchorage, for petitioner.

Don Clocksin, Sonosky, Chambers, Sachse, Miller, Munson & Clocksin, Anchorage, and Frederick Torrisi, Dillingham, for respondents and cross-petitioners.

Marjorie L. Odland, Asst. Atty. Gen. and Bruce M. Botelho, Atty. Gen., Juneau, for respondents and cross-respondents.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

COMPTON, Justice.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

This controversy concerns a portion of the Nushagak–Mulchatna watershed in Southwest Alaska. The Lake & Peninsula Borough (Borough), incorporated in 1989, originally encompassed a portion of the watershed within its northwest boundary. The "Nushagak villages" [1] and other respondents/cross-petitioners (Villages) are not located within the Borough, but rather represent subsistence users of the watershed.

A. *FACTS*

The Borough was the product of a hurried incorporation effort promoted by the Lake & Peninsula School District (District).[2] The District determined that the northwest boundary of the Borough should coincide with that of the Lake & Peninsula Regional Educational Attendance Area (REAA) boundary.

The District filed a petition for incorporation of the Borough with the Department of Community & Regional Affairs (DCRA) on November 10, 1988. DCRA, which had been working with the District to prepare the petition, accepted the petition immediately.

The District then served copies of the petition materials on "every municipality in or adjoining the territory," as required by 19 Alaska Administrative Code (AAC) 10.370(a). It published notice of the filing of the petition in various newspapers [3] as required by 19 AAC 10.380(a). It also mailed to necessary parties and published in various newspapers [4] the dates and locations of Local Boundary Commission (LBC) hearings, as required by AS 44.47.573 and 19 AAC 10.400. Nonetheless, notice of the petition or the related hearings was *not* sent to Villages.[5]

Public LBC hearings were scheduled for December 3 and 4 in Newhalen, Iliamna/Port Heiden and Chignik. However, because of adverse weather the hearings were held telephonically between the Lake & Peninsula communities, Kodiak and Anchorage. Villages did not participate. In December LBC approved the petition, as amended in part to exclude a portion of Borough land that LBC simultaneously annexed to Kodiak.

The Bristol Bay Native Association (BBNA) then submitted written comments to LBC on behalf of Villages, objecting to the Borough's northwest boundary and seeking reconsideration of LBC's decision. The Borough and DCRA opposed. At a hearing, LBC denied reconsideration. However, in the wake of complaints by Villages that they

1. The Nushagak villages include Ekwok, Koliganek, New Stuyahok, Clarks Point and Aleknagik.

2. In 1987 the Aleutians East Borough had successfully incorporated a portion of the Lake & Peninsula region. Moreover, the Kodiak Island Borough was in the process of filing a petition to annex another portion of the region.

3. *Borough Post* (November 18, 25); *Bristol Bay Times* (November 18, 25, December 2); *Kodiak Mirror* (November 16, 18).

4. *Anchorage Daily News* (November 16, 17, 18); *Borough Post* (November 11, 18, 25, December 2); *Kodiak Mirror* (November 15, 16, 17); *Bristol Bay News* (November 18, 25).

5. Villages contend that no notice was published in the *Bristol Bay Times*, "the most widely read newspaper in the Nushagak region."

had not been permitted to testify, LBC scheduled another hearing. After the second hearing, LBC again denied reconsideration.

The Borough was incorporated on April 24, 1989, when its residents voted to approve the petition. AS 29.05.110(a). It has since begun the business of local government.

B. *PROCEEDINGS*

Villages filed a complaint for declaratory and injunctive relief in the superior court in February 1989, naming LBC (and later the Borough) as defendant. The complaint alleged statutory and constitutional violations in setting boundaries and in providing notice of the incorporation process. It sought a judgment voiding LBC's incorporation decision and remanding the matter to LBC for further proceedings.

In January 1991 the superior court gave notice of its intent to dismiss the case pursuant to Alaska Civil Rule 16.1(g). Simultaneously, the Borough moved for summary judgment based on laches. Villages then moved for summary judgment based on alleged notice deficiencies. In response, the Borough, joined by LBC, sought dismissal based on the *de facto* incorporation doctrine. LBC also asserted the impropriety of proceeding other than by administrative appeal.

In July 1991 the superior court orally denied the motions for summary judgment and elected to treat the matter as an administrative appeal.[6] At that time the court opined that there were defects in the notice,[7] but did not determine their effect or the effect of the alleged *de facto* status of the Borough. In a later written decision the court found that (1) the notice violations had prejudiced Villages by abbreviating the time they had in which to voice opposition to the Borough's boundaries, and (2) the notice defects vitiated any "colorable" compliance necessary to find *de facto* incorporation status. It also rejected the Borough's laches defense. The attendant remedy was determined in a series of written responses to requests for clarification. *See infra* part II.C.1. The court declared the northwest boundary to be voidable and ruled that if LBC changed the boundary on remand, then there would have to be an election "restricted to approval of the new boundary versus retention of the existing boundary."

The Borough challenges the court's ruling regarding notice and laches.[8] Villages challenge the court's determination of the proper remedy. The LBC hearing has been stayed by mutual agreement of the parties.[9]

II. *DISCUSSION*

A. *NOTICE*

1. *Statute and Regulations.*

The following statute and former DCRA regulations are relevant to this case.[10] Alaska Statute 44.47.573 provides:

> The purpose of DCRA is "to render maximum state assistance to government at the community and regional level." AS 44.47.020. The Commissioner of Community and Regional Affairs (Commissioner or DCRA Commissioner) is the principal executive officer of DCRA. AS 44.47.010. "There [exists] in [DCRA] a local boundary commission," AS 44.47.565, which shall "develop proposed standards and procedures for changing local boundary lines; ... consider a local government boundary change requested of it by ... the [DCRA commissioner]; ... [and it may] conduct meetings and hearings to consider local government boundary changes...." AS 44.47.567(a)(2), (3), (b)(1).

6. This ruling has not been appealed.

7. The court found that under 19 AAC 10.380(a) and .400, published notice of filing the petition and proof of such must precede published notice of the hearing. Accordingly, the court noted that only the November 18 hearing notice in the *Anchorage Daily News* both met the 15-day requirement of 19 AAC 10.400 and followed the initial publication of filing notice on November 18.

8. LBC initially joined the Borough, but has withdrawn its appeal.

9. The Borough filed a notice of appeal. Since no final judgment had been entered, we dismissed the appeal *sua sponte*, treated the notice as a petition for review, and granted the petition. Appellate Rule 402.

10. 19 AAC 10 was substantially reorganized in 1992. *See* AAC Register 123. The provisions in this case last appear in their entirety in AAC Register 107. The new regulations are more explicit in their notice requirements. *See* 19 AAC 10.420-.640 (effective 1992).

> Notice of public hearings. Public notice of a hearing of the local boundary commission shall be given in the area in which the hearing is to be held at least 15 days before the date of the hearing.... The [DCRA] commissioner shall give notice of the hearing at least three times in the press, through other news media, or by posting in a public place, whichever is most feasible.

Former 19 AAC 10.370 (reorganized 1992) provides in part:

> SERVICE. (a) The petitioner shall, by certified mail, serve a copy of the petition and brief, together with accompanying exhibits, to every municipality in or adjoining the territory. The service shall be made at the same time that the petition is filed with the [DCRA] commissioner.

Former 19 AAC 10.380 (reorganized 1992) provides in part:

> NOTICE OF PETITION. (a) Upon receipt of notice from the [DCRA] that the petition and brief have been accepted, the petitioner shall cause notice of the filing of the petition to be published in a newspaper of general circulation in the territory, or if a newspaper of general circulation is not available, post notice in at least three public and prominent locations....
>
> (b) The petitioner shall furnish the [DCRA] commissioner with proof of compliance with (a) of this section. Upon receipt of the proof, the commissioner shall submit the petition and brief to the [local boundary] commission.

Former 19 AAC 10.400 (reorganized 1992) provides:

> CALL FOR HEARING. The [local boundary] commission will establish a time and place for a hearing regarding the proposed incorporation which shall be held in or near the territory proposed for incorporation. The commission will publish notice of the hearing at least 15 days before the date of the hearing, at least three times in a newspaper of general circulation in the territory, through other news media, or by posting in a public place, whichever is most feasible.

2. *Standard of Review.*

[1, 2] We review both an agency's interpretation of its own regulations [11] and an agency's exercise of its discretionary authority under the "reasonable basis" standard. *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982); *Mobil Oil Corp. v. Local Boundary Comm'n*, 518 P.2d 92, 98 (Alaska 1974); *Kelly v. Zamarello*, 486 P.2d 906, 916–17 (Alaska 1971). Moreover, because the superior court acted as an intermediate appellate court, we do not give deference to its decision. *National Bank of Alaska v. State, Dep't of Revenue*, 642 P.2d 811, 816 (Alaska 1982).

3. *Notice of the LBC Hearings Was Defective in This Case.*

[3] Villages note that the relevant regulations mandate the following orderly process: a petition is filed; the petitioner must then provide public notice of the petition (filing notice); the petitioner must then provide proof of such notice to the Commissioner; the Commissioner then informs LBC; LBC must then provide public notice of the incorporation hearing (hearing notice). Villages contend that this orderly process was not followed and, as a result, the Borough's incorporation effort was defective.[12] The supe-

11. "An administrative agency's interpretation of its own regulation is normally given effect unless plainly erroneous or inconsistent with the regulation." *State, Dep't of Highways v. Green*, 586 P.2d 595, 602 n. 21 (Alaska 1978) (citing 1A Charles Sands, *Sutherland Statutory Construction* § 31.06, at 362 (4th ed. 1972)).

12. Villages also argue that notice was defective because it failed to provide personal service of the petition to Villages "adjoining" the Borough. *See* 19 AAC 10.370 (reorganized 1992). Even though counsel for Villages conceded that no direct notice was required under the statute, they contend they assumed that adjoining meant "touching." They contend that the historical LBC interpretation of the term "adjoining" is "within 25 miles of the boundary line." The Villages of Ekwok and New Stuyahok are within fifteen miles of the boundary line. Under current regulations, personal service of the petition is required for "every municipality within an area extending 20 miles beyond the boundaries of the territory proposed for change." 19 AAC 10.460(a) (effective 1992). In view of our disposition of this case, we do not need to address this issue.

rior court agreed with the Villages and concluded that notice was defective.

The Borough argues that it complied with the requirements of AS 44.47.573, and that the superior court's interpretation of the regulations is incorrect; no provision requires that the petitioner file notice of the petition *prior to* LBC's hearing notice. Further, the Borough argues that the superior court erred in concluding that former 19 AAC 10.380(b) and 10.400 link the discrete procedures of filing notice and hearing notice, and that there is no requirement that a petition be "pending" before LBC prior to publication of hearing notice.[13] Indeed, former 19 AAC 10.380(c) provided:

> A petition filed with the commissioner may not be considered to be pending before the commission until the petition and brief have been submitted to the commissioner pursuant to this section.

Absent a link between filing notice and hearing notice, the Borough contends that there was no "contraction" of the notice period. Thus, the Borough concludes that LBC merely had to publish three notices at least fifteen days before the hearing, i.e., on or before November 18.[14]

We agree with the superior court and Villages that published notice of filing the petition and proof of such must precede published notice of the hearing.

The regulations make clear that filing notice, which occurred on November 18, had to *precede* hearing notice:

(1) former 19 AAC 10.370 required the petitioner to file the petition with the commissioner;

(2) former 19 AAC 10.380 required that the petitioner then publish filing notice, and provide proof of the same to the commissioner,[15] after which the commissioner would submit the petition to LBC;

(3) only at that point could LBC publish hearing notice as required by 19 AAC 10.400.

In this case the Borough published filing notice as follows: [16]

Borough Post	Nov. 18, 25
Bristol Bay Times	Nov. 18, 25, Dec. 2

Thus, LBC could not properly have taken steps to notice the hearings until *after November 18.*

The regulations also dictate that LBC had to publish three hearing notices at least fifteen days before the hearing, i.e., *on or before November 18.* The hearing notices were published as follows: [17]

Anchorage Daily News	Nov. 16, 17, 18
Borough Post [18]	Nov. 11, 18, 25, Dec. 2
Bristol Bay News	Nov. 18, 25.

13. The Borough argues that the superior court's decision is erroneously premised on the fact that the Commissioner's submission of the petition to LBC is a prerequisite to LBC's publication of hearing notice. AS 44.47.573 does not suggest such a link: "[t]he *commissioner* shall give notice of the hearing...." (Emphasis added). The implementing regulation, former 19 AAC 10.400, was slightly different: "[T]he *commission* will publish notice of the hearing." (Emphasis added). The Borough argues that the statute is controlling: "[T]o be valid a regulation must be consistent with the authorizing statute and reasonably necessary to carry out the statute's purpose." *Trustees for Alaska v. State, Dep't of Natural Resources,* 795 P.2d 805, 812 & n. 11 (Alaska 1990). We disagree. The regulation is not inconsistent with the statute, but was enacted pursuant to AS 44.47.980: "[T]he [DCRA] may adopt regulations ... to carry out the purposes of this chapter."

14. The Borough argues that only the first of its three newspaper notices had to precede the hearing by fifteen days. We disagree. The superior court correctly concluded that the fifteen-day period should run from the date of the *last* of the three required publications. *See Moore v. State,* 553 P.2d 8, 21 (Alaska 1976) (requiring full week to run between last of required publications on "three consecutive weeks" and sale of oil and gas lease).

15. The record does not indicate that the Borough provided proof of such notice to the commissioner.

16. There was also publication of notice in the *Kodiak Mirror* on November 16 and 18. However, the Borough admits that "[t]his was ... done given Kodiak's competing petition. The Borough does not contend that the *Kodiak Mirror* is a paper of general circulation within the Lake and Peninsula territory."

17. Notice was also published in the *Kodiak Mirror* on November 15, 16 and 17.

18. Villages concede that the *Borough Post* is a newspaper of general circulation in the Borough even though it is not distributed in the Nushagak community.

November 18 is simultaneously the earliest and latest date for three newspaper notices of the hearings. In the words of the superior court, this amounted to a "substantial contraction" of the notice period, and a defect in incorporation.[19]

[4] We agree with Villages and the superior court that the notice violations were substantial.[20] Accordingly, we affirm that portion of the superior court's decision and remand to LBC for reconsideration, following the requisite notice procedures.[21]

B. *LACHES*

[5] We have recognized laches to be a defense to suits challenging municipal formation. *Pavlik v. State Dep't of Community & Regional Affairs*, 637 P.2d 1045 (Alaska 1981); *Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 456–58 (Alaska 1974). The defense requires unreasonable delay by a plaintiff resulting in prejudice to the defendant. *Concerned Citizens*, 527 P.2d at 457. These concepts exist on a continuum: "where there is a long delay, a lesser degree of prejudice will be required." *Pavlik*, 637 P.2d at 1048.

[6] The superior court rejected the laches defense.[22] The Borough contends that it erred in doing so, making the following argument. If Villages had properly appealed LBC's boundary decision pursuant to AS 29.05.100(b), then the case could have been resolved prior to the incorporation election. Instead, Villages filed an independent action, later converted to an appeal, in February 1989. Unreasonable delay occurred as the case "lay dormant" for eighteen months (i.e., from June 1989 until January 1991, when the superior court informed Villages of its intent to dismiss for want of prosecution). Prejudice resulted from the delay because in the interim, "the Borough proceeded with the business of local government."

Villages respond that "laches is an equitable defense inapplicable to actions at law." *Gudenau v. Bang*, 781 P.2d 1357, 1363 (Alaska 1989); *Kodiak Electric Ass'n v. DeLaval Turbine, Inc.*, 694 P.2d 150, 157 (Alaska 1984).

We agree with Villages. In *Kodiak Electric*, we noted "[w]hen a party is seeking to enforce a legal right, as opposed to invoking the discretionary equitable relief of the

19. The superior court reasoned that the regulations "distinguish[ ] between the commissioner and the Commission.... If [the petition is] not pending before the Commission, it's hard to understand how ... the Commission could [publish notice of a hearing]."

20. The Borough argues that it should receive the protection of the *de facto* incorporation doctrine. The Villages argue that the *de facto* doctrine should not apply because: (1) the Alaska Legislature abolished the *de facto* doctrine with respect to private corporations, AS 10.06.218; and (2) even if the doctrine has not been abolished for municipal corporations, there was no colorable compliance with the statutory requirements.

In *Port Valdez Co., Inc. v. City of Valdez*, 522 P.2d 1147 (Alaska 1974), we held that four elements must be present in order to establish a *de facto* defense:

> (1) a constitutional or statutory provision under which the [incorporation] might lawfully have been accomplished; (2) an attempted compliance in good faith with the provision(s); (3) a colorable compliance with the provisions(s); and (4) an assumption in good faith of municipal powers.

Id. at 1154. We need not decide whether the Legislature meant to abolish both municipal and private *de facto* corporations, because the Borough has failed to establish colorable compliance with the notice provisions, as detailed above.

21. On remand, LBC may consider the underlying merits of Villages' original complaint, i.e., that the northwest boundary of the Borough "fail[s] to conform generally to natural geography." *See* AS 29.05.031.

22. "We will not overturn a trial court's decision that an action is barred by laches unless we have a firm and definite conviction that a mistake has been committed." *Pavlik*, 637 P.2d at 1047.

The Borough acknowledges that the defense is "typically raised in response to delays in filing suit, ... [but] applies to post-filing delay as well" because such application serves the state's policy to resolve challenges to municipal formation quickly. *See* AS 29.05.150 (prescribing six-month statute of limitations for challenging municipal incorporation). Villages respond that Alaska cases limit the laches defense to situations in which the plaintiff has "unreasonably delayed in *bringing the action*." *Foster v. State*, 752 P.2d 459, 465 (Alaska 1988). Moreover, Villages contend that in other jurisdictions applying laches to post-filing delays, courts have required a demonstration of belief of abandonment. *See Butcher v. City of Albuquerque*, 95 N.M. 242, 245, 620 P.2d 1267, 1270 (1980).

courts, the applicable statute of limitations should serve as the sole line of demarcation for the assertion of that right." 694 P.2d at 157. In this case, Villages' action was timely filed; the action proceeded at law and the equitable defense of laches was inapplicable.

C. *REMEDIES*

1. *Proceedings in the Superior Court.*

Following oral argument on November 13, 1992, the superior court "took the issue of remedy under advisement." The parties agreed that "reconsideration ... should be limited to the precise drawing of the Borough's northwest boundary." The Borough and LBC opposed any action that could result in disincorporation. They favored detachment. Villages opposed detachment because the standards for detachment are more stringent than those applicable to incorporation.[23] The superior court concluded that detachment was not a viable remedy:

> [I]t is readily apparent that the Local Boundary Commission could determine that different boundaries are warranted under the more general incorporation standards, but that detachment would not be justified under the narrow criteria of the applicable regulation.

It concluded that the proper remedy was an election limited to the placement of the northwest boundary.[24]

The Borough moved for reconsideration seeking, *inter alia*, clarification of the meaning of "restricted" election.[25] The court denied the motion, but stated that

> the reconsideration process ... starts from the premise that the existing boundary ... is in place. The Commission and Borough residents will ultimately have to decide whether to maintain or alter the existing boundary. It was not the court's intention that the voters be presented with the choice of no northwest boundary, and thus no borough.

The Borough requested further clarification of "the nature of any election that would be held in the event the LBC determines that the northwest boundary should change." The court emphasized that "any change in borough boundaries must be approved by the electorate," rather than LBC, but again noted that "any election would have to be limited to approval or disapproval of a change in the borough's northwest boundary." [26]

2. *The Superior Court Erred in Formulating a Remedy.*

The superior court's final order regarding remedy provides:

> Should the LBC decide that the northwest boundary of the [Borough] should remain unchanged, no election would be required; should the Commission decide otherwise, an election restricted to approval of the new boundary versus retention of the existing boundary would be required.

Villages cross-appeal the superior court's decision. The issue concerns only the situa-

23. *See infra* part II.C.2.

24. The court ordered that (1) the Borough's northwest boundary was voidable due to defective notice; (2) LBC had to reconsider the northwest boundary following required notice and hearing provisions; and (3) a restricted election be held.

25. At the same time, LBC presented three questions regarding clarification of the remedy to the court, to which it received the following answers:

> [Q] (1) [Is] the LBC ... required to conduct on [sic] election on the issue of the northwest boundary of the [Borough] even if, after reconsideration pursuant to the court's decision, the LBC determines the northwest boundary should remain the same[?]
> [A (1) No. The court requested supplemental briefing; the parties thereafter "agreed that no election would be required should the Commission vote to retain the present boundary."]
> [Q] (2) [Will] an election limited to the question of the northwest boundary ... correct the *de facto* incorporation deficiency of the [Borough?]
> [A (2)] [A]dhering to the procedures outlined in the [oral] decision, as supplemented hereafter on the election question, will cure the deficiencies found in the decision and render the incorporation no longer voidable.
> [Q] (3) [I]f no election is required and the LBC does not change the northwest boundary, what is the legal status of the [Borough] under the court's decision?
> [A (3)] [S]ame as was provided in response to Question No. 2.

26. The court acknowledged Villages' opposing argument that the results of such an election would be "foreordained."

tion in which, upon reconsideration, LBC changes the boundary to exclude the Nushagak watershed. Villages argue that Borough voters should be given a choice of "changed boundary or no borough." The Borough responds that the superior court correctly defined the election as a choice of "changed boundary or previous boundary."

Villages argue that "boundary decisions should be made by the Local Boundary Commission or the Legislature, not the voters." [27] *See City of Douglas v. City & Borough of Juneau*, 484 P.2d 1040, 1042–43 (Alaska 1971); *Oesau v. City of Dillingham*, 439 P.2d 180, 183–84 (Alaska 1968); *Fairview Pub. Util. Dist. No. 1 v. City of Anchorage*, 368 P.2d 540, 543 (Alaska), *cert. denied*, 371 U.S. 5, 83 S.Ct. 39, 9 L.Ed.2d 49 (1962). They conclude that "[t]he superior court's decision to essentially remand this matter back to Borough voters goes against the [Alaska C]onstitution, the statutes, and indeed the very purpose of the LBC." [28]

[7] We agree. It does not appear that a municipality can ignore an LBC boundary decision. An election permitting voters to choose between two boundaries essentially allows the electorate to establish the boundary without regard to LBC's action on reconsideration. In *Fairview*, this court examined the purpose of Article X of the Alaska Constitution and determined that "local political decisions do not usually create proper boundaries and that boundaries should be established at the state level." [29] 368 P.2d at 543; *accord* 1 Dallas Sands et al., *Local Government Law* § 8.29 (1994).

[8] The Borough argues that detachment is the proper remedy. Villages respond that the *detachment* standard differs from the *incorporation* standard. The standard for incorporation is found in AS 29.05.031(a)(2), which provides in part:

> [T]he boundaries of the proposed borough [must] conform generally to natural geography and include all areas necessary for full development of municipal services.

The standard for detachment applicable at the time Villages filed suit was found in 19 AAC 10.230(a)(2) (reorganized 1992), which provided in part:

> In determining whether to approve a detachment, the commission will consider, but is not limited to ... whether the geographic location or configuration of the territory precludes the provision of borough services provided other areas of the borough or makes the provision of borough services impractical....

Villages express two concerns regarding the differing standards:

> There is no mention of natural geography in the detachment regulation nor any provision that makes it likely that the concerns of an unincorporated borough would be heard. Moreover, there remains the question of which party would carry the burden of proof. Under the statutory incorporation standards, the Borough incorporators have to justify the inclusion of all the territory which they wish [to] incorporate. Under the detachment regulations, previous compliance with the incorporation standards is presumed.

27. Article X, section 12 of the Alaska Constitution provides:

> Boundaries. A local boundary commission or board shall be established by law in the executive branch of the state government. The commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action.

28. Villages note that

> [i]f the voters choose disincorporation, they obviously do not consider it a devastating prospect. It is axiomatic that all political power is inherent in the people, *Alaska Const. Art. I, § 2*, and the people already hold the power to dissolve a unit of local government. AS 29.06.460 *et seq.*

29. The Fairview Public Utility District argued that it had been annexed improperly to the City of Anchorage by legislative action instead of petition-election. *Fairview*, 368 P.2d at 541, 543. This court affirmed the annexation, expressing concern for objectivity in making boundary decisions. *Id.* at 543–44.

We agree that detachment will not adequately remedy Villages' concerns. In fashioning a remedy, the superior court was guided by *Alaska Community Colleges' Federation of Teachers v. University of Alaska (ACCFT)*, 677 P.2d 886 (Alaska 1984), and its direction that "approximation of the status quo at the time of the original decision is desirable."[30] *Id.* at 890. However, the court recognized the difference between an "ideal" remedy and a "practical" remedy, and cautioned that "the damage to the public good" should not outweigh the "benefits derived" from the remedial action. *Id.* at 890, 892.

We hold that under *ACCFT*, an election between no borough or a borough excluding the Nushagak watershed will best approximate the status quo. *See* 677 P.2d at 890. The prospect that the Borough will not be incorporated does not constitute "damage to the public good" outweighing the benefits of remedying the notice violations. *See id.* at 891–92.

III. *CONCLUSION*

We AFFIRM the court's conclusion that notice was defective and did not substantially colorably comply with the requirements. Accordingly, we REMAND the case to LBC for consideration of whether LBC complied with the statutes addressing municipal boundary determination. This consideration can be undertaken only after all statutory requirements have been met.

If LBC does not change the boundary, no new election will be required. However, if LBC changes the boundary, then the Borough must hold an election in which voters would have to choose either (1) to incorporate according to the changed boundary, or (2) not to incorporate. Thus, we REVERSE the superior court's formulation of a remedy in this case.

30. *ACCFT* has guided Alaska courts in fashioning remedies, even outside the context of the Open Meetings Act. *See Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 183 n. 32 (Alaska 1986).

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.[31]

Anton ROECKL, individually, and d/b/a Fermell Company, Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, Appellee.

No. S-5622.

Supreme Court of Alaska.

Dec. 2, 1994.

Federal Deposit Insurance Corporation (FDIC), in its corporate capacity as successor of failed bank, filed action against grantor and grantee of real property alleging that grantee, an assumed business name, was nonexistent entity and that grantor's conveyance of property to grantee was sham transfer to avoid judgment lien against grantor resulting from his failure to pay on collateral note owed to bank and seeking to set aside conveyances as fraudulent. Answer was filed on behalf of grantee by its owner counterclaiming against FDIC for equitable and legal lien against property for all sums paid to grantor and against grantor for damages in event deeds were declared void. The Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, J., granted partial summary judgment to FDIC finding that warranty deeds were void and setting aside conveyances as fraudulent. Owner of grantee appealed. The Supreme Court, Bryner, J., pro tem., sitting by assignment, held that: (1) transfers to grantees under assumed name, as opposed to transfers to wholly fictitious or

31. We granted expedited consideration and issued an order on July 22, 1994 that forms the basis for this opinion.

893 P.2d 1239, Keane v. Local Boundary Com'n, (Alaska 1995)

Jack KEANE and Concerned Citizens of Bristol Bay, Appellants,

v.

LOCAL BOUNDARY COMMISSION and Incorporators of the City of Pilot Point, Intervenors, Appellees.

No. S-5370.
Supreme Court of Alaska.
April 14, 1995.

Jack KEANE and Concerned Citizens of Bristol Bay, Appellants,

v.

LOCAL BOUNDARY COMMISSION and Incorporators of the City of Pilot Point, Intervenors, Appellees.

No. S-5370.

Supreme Court of Alaska.

April 14, 1995.

Citizen sought judicial review of decision of Local Boundary Commission allowing incorporation of city. The Superior Court, Third Judicial District, J. Justin Ripley, J., upheld Commission's decision, and citizen appealed. The Supreme Court, Compton, J., held that: (1) Commission was required to consider whether it was reasonable or practicable for borough in which city was located to provide services sought through incorporation of city; (2) Commission's decision was not predicated on illegal tax; (3) incorporators were properly allowed to intervene in suit; and (4) citizen was public interest litigant.

Affirmed in part; reversed and remanded in part.

1. Administrative Law and Procedure ⇐790

Statutes ⇐219(1)

When administrative decision involves expertise regarding either complex subject matter or fundamental policy formulation, court defers to the decision if it has reasonable basis; in contrast, court exercises independent judgment when interpreting statute which does not implicate agency's special expertise or determination of fundamental policies.

2. Appeal and Error ⇐842(1)

Constitutional issues present questions of law to which reviewing court applies its independent judgment; they should be given reasonable and practical interpretation in accordance with common sense.

3. Municipal Corporations ⇐5

In determining whether incorporation of city is consistent with constitutional and statutory provisions limiting creation of new governments in order to minimize duplicate taxation, question is whether it is reasonable or practical for borough to provide services, and, if it is not, city may be incorporated. Const. Art. 10, §§ 1, 5; AS 29.05.021(b), 29.35.450(b).

4. Municipal Corporations ⇐12(12)

Remand to Local Boundary Commission (LBC) was required so that LBC could specifically consider reasonableness and practicability of having borough in which city was located provide services, even though administrative record indicated that city seeking to incorporate was remote. AS 29.05.021(b).

5. Municipal Corporations ⇐12(9)

Local Boundary Commission (LBC) is not required to set forth findings of fact in its incorporation decisions.

6. Taxation ⇐1208

Statute providing that municipality may not levy taxes that would result in tax revenues from all sources exceeding $1,500 a year for each person residing within municipal boundaries does not apply to sales taxes; rather, statute applies to property taxes only. AS 29.45.090(b)(1).

7. Constitutional Law ⇐285.4
Taxation ⇐1219

Municipal sales tax on fish conferred "benefit" on taxpayers and, therefore, did not violate taxpayers' due process rights, as long as services for which taxes were assessed were available to taxpayers, regardless of whether taxpayers would use the services. U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

8. Taxation ⇐1219

Use of revenue from sales and use tax on fish to establish savings account for future public purposes was "public purpose," within meaning of constitutional provision stating

that no tax shall be levied except for public purpose; therefore, sales and use tax on fish had "public purpose." Const. Art. 9, § 6.

See publication Words and Phrases for other judicial constructions and definitions.

9. Appeal and Error ⇐458(2)

Superior court has discretion to stay nonmonetary judgment pending appeal. Rules App.Proc., Rule 603(a)(2).

10. Municipal Corporations ⇐12(11)

Superior court did not abuse its discretion by declining to stay, pending appeal, nonmonetary judgment pertaining to propriety of Local Boundary Commission's (LBC's) decision to allow incorporation of city; given effect on right to petition and vote for incorporation and right to vote for tax measure to ensure financial viability of city, public interest did not favor staying incorporation of city, and appellant made no showing of irreparable harm or probability of success on the merits. Rules App.Proc., Rule 603(a)(2).

11. Administrative Law and Procedure ⇐673

Municipal Corporations ⇐12(12)

Superior Court did not abuse its discretion by allowing city incorporators to intervene in legal challenge to incorporated city's existence, notwithstanding fact that intervention increased complexity of litigation. Rules Civ.Proc., Rule 24(b).

12. Costs ⇐194.42, 194.46

Party challenging legality of incorporation of city was "public interest litigant," and was, therefore, not subject to an award of attorney fees; litigant challenged alleged violation of constitutional provision limiting tax levying authorities, sought determination clarifying statutory limitations on tax levying powers, and lacked sufficient economic incentive to bring the suit.

See publication Words and Phrases for other judicial constructions and definitions.

13. Costs ⇐194.42, 194.46

Criteria for identifying "public interest suit" for which unsuccessful litigant is not subject to award of attorney fees, are whether case is designed to effectuate strong policies, whether numerous people would benefit from successful suit, whether only a private party could be expected to bring the suit, and whether litigant would lack sufficient economic incentive to bring lawsuit if it did not involve issues of great public importance; all four factors must exist before a party is considered a "public interest litigant."

See publication Words and Phrases for other judicial constructions and definitions.

Andrew M. Hemenway, Anchorage, for appellants.

Marjorie L. Odland, Stephen Slotnick, Asst. Attys. Gen., Juneau, Charles E. Cole, Atty. Gen., Juneau, for appellee Local Boundary Commission.

Bruce F. Stanford, Anchorage, for intervenors and appellees Incorporators of City of Pilot Point.

Glen K. Vernon, King Salmon, for amicus curiae Lake and Peninsula Borough.

Before MOORE, C.J., RABINOWITZ, MATTHEWS, COMPTON, JJ., and BRYNER, J. Pro Tem.*

ORDER

On consideration of the petition for rehearing, filed on November 18, 1994, IT IS ORDERED:

1. The petition for rehearing is GRANTED to the extent that the final sentence of the opinion is deleted and replaced with the following sentence: "Finally, we conclude that Keane is a public interest litigant and therefore REVERSE the superior court's awards of attorney's fees, and REMAND the issue of attorney's fees to the superior court for redetermination."

a. Opinion No. 4145, issued on November 18, 1994, is WITHDRAWN.

b. Opinion No. 4187 is issued today in its place.

* Sitting by assignment under article IV, section 16 of the Alaska Constitution.

2. The petition for rehearing is DENIED in all other respects.

Entered by direction of the Court at Anchorage, Alaska on April 14, 1995.

Before MOORE, C.J., RABINOWITZ, MATTHEWS and COMPTON, JJ., and BRYNER, J. Pro Tem.**

OPINION

COMPTON, Justice.

This appeal arises from a decision of the Local Boundary Commission (LBC) approving the incorporation of the City of Pilot Point. Jack Keane and Concerned Citizens of Bristol Bay (collectively Keane) argue that the LBC's decision lacks a reasonable basis, that it is based upon an illegal tax, and that it is contrary to Alaska law. In addition, Keane appeals the following discreet superior court decisions: (1) the decision to allow the incorporators of Pilot Point (Incorporators) to intervene, (2) the decision to deny Keane's request for a stay pending appeal, (3) the decision to deny Keane public interest status, and (4) the decision to award attorney's fees to the LBC and the Incorporators.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

Pilot Point is located within the Lake and Peninsula Borough [1] (Borough), on the shores of Bristol Bay. Voters from the Pilot Point area prepared a petition seeking incorporation of Pilot Point as a second class city. The petition included a request that incorporation be conditioned on approval of a three percent sales and use tax on the sale of fish in the community.

After review and approval by the Department of Community and Regional Affairs (DCRA), the petition was presented to the LBC. Following a public hearing, the LBC approved an amended petition. Both incorporation and the sales and use tax were approved by the voters of Pilot Point.

Keane appealed the LBC decision to the superior court, and filed a motion to stay certification of the incorporation election results. The Incorporators filed a motion to intervene in the appeal and an opposition to the motion to stay. The LBC aligned itself with the Incorporators, supporting the motion for intervention and opposing the motion to stay. Keane opposed the Incorporators' motion to intervene. The superior court granted the motion to intervene, denied the motion for a stay and allowed certification of the election results. Keane then sought review of the superior court's order by filing an Emergency Motion for Stay in this court. The motion was denied. (No. S–4922 Order, January 21, 1992). The superior court affirmed the LBC's decision approving the petition for incorporation. The Incorporators and the LBC then filed motions for attorney's fees. Keane opposed both motions, claiming public interest litigant status. The court denied Keane's request and awarded partial attorney's fees to the LBC and the Incorporators in the amount of $1,500 and $11,350, respectively. This appeal followed.

II. *DISCUSSION*

A. STANDARDS OF REVIEW

[1] When an administrative decision involves expertise regarding either complex subject matter or fundamental policy formulation, we defer to the decision if it has a reasonable basis. *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987); *Mobil Oil Corp. v. Local Boundary Comm'n*, 518 P.2d 92, 98 (Alaska 1974). In contrast, we exercise our independent judgment when interpreting a statute which does not implicate an agency's special expertise or determination of fundamental policies. *See City of Valdez v. State, Dep't of Community & Regional Affairs*, 793 P.2d 532, 533 n. 6 (Alaska 1990).

[2, 3] Constitutional issues present questions of law to which this court applies its independent judgment. They "should be given a reasonable and practical interpretation

** Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

1. The validity of the 1989 incorporation of the Borough is currently before this court on a challenge from villages in the Nushagak watershed. *See Lake & Peninsula Borough v. Local Boundary Comm'n.*, Nos. S–5476/5485.

in accordance with common sense." *Arco Alaska, Inc. v. State,* 824 P.2d 708, 710 (Alaska 1992).

B. ALASKA'S CONSTITUTION AND STATUTES REQUIRE AN INQUIRY INTO WHETHER IT IS REASONABLE OR PRACTICABLE FOR A BOROUGH TO PROVIDE SERVICES BEFORE INCORPORATION OF A CITY IS ALLOWED

1. Statutory and constitutional provisions.

Article X, section 1 of the Alaska Constitution states that the purpose of article X is

> to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions.

Article X, section 5 of the Alaska Constitution provides in part:

> Service areas ... may be established ... by the assembly, subject to the provisions of law or charter. A new service area shall not be established if, consistent with the purposes of this article, the new service can be provided by ... incorporation as a city....

Alaska Statute 29.05.021(b) provides:

> A community within a borough may not incorporate as a city if the services to be provided by the proposed city can be provided on an areawide or nonareawide basis by the borough in which the proposed city is located....

Alaska Statute 29.35.450(b) provides:

> A new service area may not be established if, consistent with the purposes of art. X of the state constitution, the new service can be provided by an existing service area ... or by incorporation as a city.

2. Arguments presented.

Keane contends that AS 29.05.021(b) prohibits the incorporation of a city when formation of a service area is theoretically possible, or at least when formation of a service area is "reasonable" or "practicable." Keane asserts that the Borough could reasonably and practicably provide the services desired by the Incorporators as evidenced by the LBC's statement acknowledging that the Borough "could, on a service area basis, provide other services needed or desired by the residents of Pilot Point." [2]

The LBC argues that Keane's interpretation of AS 29.05.021(b) is contrary to AS 29.35.450(b), constitutional law and the relevant interpretive regulation, 19 Alaska Administrative Code (AAC) 10.020(a), as well as the LBC's power to base its decision on fundamental policy considerations. The LBC contends that (1) Keane's interpretation would force a borough to provide services regardless of whether the borough "wants" to provide them, and (2) a borough cannot be "required" to establish a service area.

The Borough argues that even if AS 29.05.021(b) is construed to require boroughs to create new service areas, it is exempt from its provisions because of its home rule status.[3] The Borough argues that article X,

2. Arguing as amicus curiae, the Borough contends that it "has never provided, nor does it now provide, either on an areawide or a nonareawide basis, the services that Pilot Point proposed to provide for itself through incorporation." It further argues that state law does not suggest that, "in the absence of such services already being provided, the Borough was somehow obligated to create a service area in preference to having a local community incorporate in order to provide needed municipal services." In addition, the Borough has established a preference for incorporation over establishment of a new service area when necessary services are not already provided. *See* Lake & Peninsula Borough, Municipal Code § 10.01.010(C).

3. A home rule municipality "is a city or a borough that has adopted a home rule charter, or ... is a unified municipality. [It] has all legislative powers not prohibited by law or charter." AS 29.04.010; *see* Alaska Const. art. X, § 11. In contrast, a general law municipality "is an unchartered borough or city. It has legislative powers conferred by law." AS 29.04.020. General law municipalities are of five classes, two of which are first and second class boroughs. AS 29.04.030. The powers of first and second class boroughs are set forth at AS 29.35.200, .210. The concepts of "general" and "home rule" are not exclusive. A first class city or first class borough may adopt a home rule charter. Alaska Const. art. X, § 9; *see generally,* Thomas A. Morehouse & Victor Fischer, Institute of Social, Economic & Government Research, *Borough Government in Alaska* 56–59 (1971).

Alaska Statute 29.10.200 provides in part: "Only the following provisions of this title apply

section 5 of the Alaska Constitution allows the creation of service areas only when other options, including incorporation of a city, are not available.

Keane responds that article X, section 5 of the Alaska Constitution, when read in conjunction with article X, section 1, allows incorporation of a city only when a service area could not be created to provide the same services, because incorporation of a city will increase the number of local government units and tax-levying jurisdictions.

3. Interpretation of the law.

We conclude that AS 29.05.021(b) is not in conflict with either AS 29.35.450(b) or article X, section 5 of the Alaska Constitution. Alaska Statute 29.35.450(b), which follows the language of article X, section 5, is a limitation on the *creation of new service areas.*[4] It provides that a new service area may not be established if the new service can be provided by another means such as incorporation of a city. In contrast, AS 29.05.021(b) is a limitation on the *incorporation of cities.* It disallows incorporation when the desired services can be provided by a borough on an *areawide or nonareawide* basis. A home rule borough can provide services on an areawide or nonareawide basis without resort to a service area.[5]

It is reasonable to interpret AS 29.35.450(b) and article X, section 5 as preferring incorporation of a city over the creation of new service areas. This interpretation is supported by legislative history and is not inconsistent with article X, section 1 of the Alaska Constitution.[6] Constructing a barrier to approving an excessive number of government units does not prohibit the cre-

to home rule municipalities as prohibitions on acting otherwise than as provided...." The section continues, listing the applicable sections of the code. Alaska Statute 29.05.021(b) is not listed. When the Alaska Legislature revised the municipal code in 1975, it elaborated on the purpose of AS 29.10.200:

> Home rule limitations are gathered together and listed in one place in article 2 of the chapter (Sec. 29.13.010) [renumbered to 29.10.200 in 1985]. The listing makes explicit the legislative intent as to which provisions of the code apply to home rule municipalities, as prohibitions on acting otherwise than as provided, and which do not. Additionally, the provisions themselves contain a specific reference making them applicable to home rule municipalities. The listing and specific references in the provisions are intended to coincide. (As additional provisions of law are enacted subsequent to the time the code takes effect, provisions which are intended to apply to home rule as well as to general law municipalities as prohibitions on acting otherwise than as provided should make a specific reference to home rule municipalities within the provision and should, under the form of the new code, also be included in the listing under Sec. 29.13.100, so as to maintain clearly the legislative distinction as to which code provisions apply to home rule municipalities and which do not.)

1972 House Journal 1720. It appears from the legislative history that AS 29.05.021(b) is inapplicable to home rule municipalities. *See Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1222 n. 3 (Alaska 1993) (Moore, C.J., dissenting).

4. A service area "provide[s] specialized services in a borough ... [that are] not provided on an areawide or nonareawide basis in the borough, or a higher or different level of service than that provided on an areawide or nonareawide basis." AS 29.35.450(a).

5. As a home rule borough, the Lake & Peninsula Borough is necessarily a first class borough. Alaska Const. art. X, § 9; *see also* AS 29.35.200(c) ("[A] first class borough may, on an areawide basis, exercise a power not otherwise prohibited by law if the power has been acquired in accordance with AS 29.35.300."); AS 29.35.200(a) ("A first class borough may exercise by ordinance on a nonareawide basis any power not otherwise prohibited by law.").

6. *See* Morehouse & Fischer, *supra*, at 42 ("The stated purpose of preventing duplication of tax levying jurisdictions and providing for a minimum of local government units was directly responsible for [article X, section 5 of the Alaska Constitution]."); *see also* 4 Proceedings of the Alaska Constitutional Convention (PACC) 2714–15 (January 20, 1956) (Delegate Rosswog stated that the main intention of section 5 was "to try not to have a lot of separate little districts set up ... handling only one problem.") It is noteworthy that an amendment to eliminate the option of "incorporation as a city" from article X, section 5 was defeated by the convention. 4 PACC 2712–17 (January 20, 1956).

Indeed, the LBC has recognized that the provisions for service areas in article X, section 5 would be "particularly applicable to conditions in Alaska. Thus many areas which have not yet attained a sufficient tax base or population to incorporate as a city will be assisted." Local Boundary Commission, First Report to the Second Session of the First Alaska State Legislature, at I–7 to I–8 (1960).

ation of them when they are necessary.[7] Whether a service area or a city is established, another government unit is created. If numerous service areas are set up supplying only one or two services each, there is the potential for an inefficient proliferation of service areas. In contrast, once a city is established, it can provide many services, and other communities can annex to the city in the future.[8] Although the framers entertained the idea of unified local governments, they realized that the need for cities still existed.[9]

Based on the above discussion, we interpret AS 29.05.021(b) as follows: when needed or desired services can be reasonably and practicably provided on an areawide or nonareawide basis by the borough, they should be.[10] As discussed *supra*, this inquiry is not limited to an evaluation of service areas. When it is established that the services cannot be provided reasonably or practicably, then the LBC is required to consider other available options. We also clarify that there is a statutory and constitutional preference for incorporation of cities over the establishment of new service areas. We believe these to be reasonable and practical interpretations of the Alaska Constitution in accordance with common sense. *See Arco Alaska*, 824 P.2d at 710.

4. The LBC erred in its incorporation determination by failing to address whether the Borough could reasonably and practicably provide the desired services.

[4] Keane argues that even if a requirement of "reasonableness" or "practicability" is read into AS 29.05.021(b), the LBC provides no evidence which supports a conclusion that formation of a service area is not "reasonable" or "practicable." Keane contends that a Borough's support of a petition for incorporation is not equivalent to a refusal to create a new service area.

At issue is former 19 AAC 10.020,[11] a regulation which interprets AS 29.05.021(b)

7. Victor Fischer, an authority on Alaska government, "advises that the 'minimum of local government units' language ... was aimed at avoiding special districts such as health, school, and utilities districts having separate jurisdiction or taxing authority. He notes no policy was stated limiting the number of cities and boroughs." *DCRA Report to the Alaska Local Boundary Commission on the Proposed Yakutat Borough Incorporation and Model Borough Boundaries for the Prince William Sound, Yakutat, Cross Sound/Icy Strait Regions* 50 (December 1991) [hereinafter *Yakutat Report*]. Nonetheless, in *City of Douglas v. City and Borough of Juneau*, 484 P.2d 1040 (Alaska 1971), we noted that article X, section 1 "expresse[s] [a] constitutional policy of minimizing the *number* of local government units." *Id.* at 1044 (emphasis added). In addition, the DCRA has concluded that "the constitutional language 'minimum of local government units' does admonish the LBC to guard against approving the creation of an excessive number of local governments." *Yakutat Report, supra* at 52. We note that neither view supports the addition of unnecessary government units.

8. Delegate Doogan referred to a city as a "combination of service areas within a borough." 4 PACC 2652 (January 19, 1956).

9. "In an attempt to simplify local government and prevent the overlapping of governmental functions," consistent with the purpose of article X, section 1, "the framers of the constitution ... considered establishing a single unit of local government with the abolition of cities altogether." *City of Homer v. Gangl*, 650 P.2d 396, 400 (Alaska 1982). Although advantageous, the framers considered it a "concept whose time had not yet come." *Id.* "Section 2 of Article X presents the compromise solution: 'All local government powers shall be vested in boroughs and cities. The state may delegate taxing powers to organized boroughs and cities only.'" *Id.* (quoting Alaska Const. art. X, § 2).

10. We reject Keane's interpretation that incorporation of a city is allowed only when it is theoretically impossible for a borough to provide services. To accept such an interpretation would render the LBC powerless to approve the incorporation of any new city that is located within an organized borough because all organized boroughs have the power to provide services. *See* Alaska Const. art. X, § 5; AS 29.35.450.

11. Former 19 AAC 10.020(a) was revised and renumbered in 1992. AAC Register 123. The new regulation does not mention remoteness. It reads:

> In accordance with AS 29.05.021(b), a city may not incorporate as a city if essential city services can be provided more efficiently or more effectively by annexation to an existing city, or can be provided more efficiently or more effectively by an existing organized borough.

19 AAC 10.010(b).

Keane argues that regardless of whether the LBC relied on former 19 AAC 10.020(a), it does

and assists the LBC in determining whether the formation of a service area is reasonable or practicable. It provided in part:

> (a) The commission will not allow the incorporation of a community located within an organized borough unless the petitioners demonstrate to the satisfaction of the commission that the services to be exercised by the proposed city cannot be reasonably or practicably exercised by the borough on an areawide or non-areawide basis. The commission will consider the requirement of this subsection satisfied if:
>
> ....
>
> (2) the commission determines that the city is remote from the borough seat and is not connected to the borough seat by the state highway system.

Keane asserts that the LBC raises for the first time on appeal to the superior court its finding of remoteness and attendant reliance on 19 AAC 10.020. The LBC asserts that it did not "overlook" the application of 19 AAC 10.020. It notes the applicability of 19 AAC 10.020 in its Findings and Conclusions:

> AS 29.05.011 sets out four standards for the LBC to apply to all petitions for city incorporation. A fifth standard, set out in AS 29.05.021(b), applies only to communities such as Pilot Point which are in organized boroughs. The Alaska Administrative Code, 19 AAC 10.010 and 10.020, gives the criteria which the LBC, in its discretion, should consider when applying the statutory standards, although the Commission is not limited to the listed factors.

Remoteness was part of the record before the LBC. The fact that Pilot Point is not connected to the borough seat, King Salmon, by any road, and the fact that Pilot Point is eighty-five air miles from King Salmon, were mentioned in the Incorporator's petition as well as the DCRA reports to the LBC. The LBC argues that there was no need to discuss specifically in its decision remoteness or its effect on the criteria of 19 AAC 10.020(a)(2).

[5] The LBC is not required to set forth findings of fact in its incorporation decisions. *Mobil Oil Corp. v. Local Boundary Comm'n*, 518 P.2d 92, 97 (Alaska 1974). In *Mobil Oil*, we stated that "[t]he special function of the [LBC], to undertake a broad inquiry into the desirability of creating a political subdivision of the state, makes us reluctant to impose an independent judicial requirement that findings be prepared." *Id.* We stated that we were able to determine the basis of the LBC's decision from our own review of the entire record. *Id.*

Keane responds that where a decisional document shows on its face that an important factor was not considered, the court should remand the matter for further consideration. *See, e.g., Southeast Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 549 (Alaska 1983). We agree.

The LBC's decision allowing incorporation provides:

> Given the lack of any city close to the community of Pilot Point, annexation to an existing city is impractical. *While the Lake & Peninsula Borough could, on a service area basis, provide other services needed or desired by the residents of Pilot Point, the Borough Assembly formally supports incorporation of the city.* Therefore, service area formation does not appear to be a viable option at this time.

The LBC argues the applicability of 19 AAC 10.020, notes its importance in the consideration of the statutory standards for incorporation, and acknowledges the facts that

not govern this appeal. Keane asserts that the court needs to follow the law in effect at the time it renders its decision, not the law in effect at the time of the administrative decision. However, AS 44.62.240 provides:

> If a regulation adopted by an agency under [the Administrative Procedure Act (APA)] is primarily legislative, the regulation has prospective effect only. A regulation adopted under [the APA] that is primarily an "interpretative regulation" has retroactive effect only if the agency adopting it has adopted no earlier inconsistent regulation and has followed no earlier course of conduct inconsistent with the regulation. Silence or failure to follow any course of conduct is considered earlier inconsistent conduct.

The earlier regulation included a remoteness factor; the new regulation does not include this factor and is inconsistent with the prior regulation. Thus, regardless of whether this court interprets 19 AAC 10.020(a) as a legislative or interpretative regulation, its application is *prospective* only.

support a finding of remoteness. Nonetheless, we cannot ascertain from the record whether the LBC made a "reasonableness" or "practicability" determination, and if it did, whether it found a lack of the two based on a remoteness theory. The LBC does not refer to the facts concerning a remoteness determination in its conclusions. Its decision appears to be based solely on the fact that the residents of Pilot Point wanted to incorporate and that the Borough Assembly formally supported the incorporation.[12] There is no indication that a determination of the "reasonableness" or "practicability" of a service area was considered. Therefore, we remand to the LBC to make findings consistent with this opinion.

C. THE LBC'S DECISION WAS NOT PREDICATED ON AN ILLEGAL TAX

Approval of the incorporation petition by local voters was contingent on their simultaneous approval of a proposed three percent tax on the sale of fish within the city. Keane argues that this tax is illegal based on three theories: (1) the tax violates AS 29.45.090(b); (2) the tax denies due process of law to the taxpayers; and (3) the tax violates article IX, section 6 of the Alaska Constitution. Each of these areas is discussed below.

1. Alaska Statute 29.45.090(b)(1) does not apply to sales taxes.

[6] Alaska Statute 29.45.090(b)(1) provides that "[A] municipality ... may not levy taxes ... that will result in tax revenues from all sources exceeding $1,500 a year for each person residing within the municipal boundaries." Keane asserts that the tax limitation of AS 29.45.090(b)(1) applies to sales taxes[13] because the language refers to "all sources" and that the three percent tax exceeds the amount allowed.[14] The LBC responds that Keane's interpretation of AS 29.45.090(b)(1) is inconsistent with municipal taxation practices as well as rules of statutory construction.[15]

Alaska Statute 29.45.090 provides in part:

> (a) A municipality may not, during a year, levy and tax for any purpose in excess of three percent of the assessed *value*

12. The Borough has formulated and adopted a "Philosophy and Mission Statement" favoring community self-determination and limiting the size and scope of Borough government and services. Minutes of Joint Borough Assembly/Planning Committee Meeting, March 16, 1992.

13. Keane contends that, historically, the limitation on municipal taxes applied to all taxes. Section 16-4-1 Alaska Compiled Laws Annotated (ACLA) (1949) provided:

> No incorporated town or municipality shall levy *any* tax for any purpose in excess of 3 per centum of the assessed valuation of property within the town in any one year.

(Emphasis added). This language was amended in 1960 by a proviso that the three percent limitation did not apply to taxes levied for bond payments. Ch. 94, § 1, SLA 1960, codified as AS 29.30.020. The general tax limitation was codified in 1962 as AS 29.30.010. It provided:

> No incorporated town or municipality may levy *and* tax for any purpose in excess of three per cent of the assessed valuation of property within the town in any one year.

(Emphasis added). Keane claims that the change of "any" to "and" is a typographical error. There is no legislative history available on this change. A staff member of the Legislative Reference Library opines that in 1962 there was a conscious effort to eliminate as many "any's" as possible from the code. Keane contends that AS 29.30.010 was and remained a generic limitation on all forms of municipal taxation. AS 29.30.010 was recodified without substantial change as AS 29.53.050 (1972). Ch. 118, § 2, SLA 1972. AS 29.53.050 was amended by adding subsection (b) in 1973. Ch. 1, § 4, FSSLA 1973. AS 29.53.050(b) expanded on the three percent limitation by providing two alternative per capita tax limitations. Keane contends that the valuation formula used in subsection (b)(2) was, for the first time, a limit specifically restricted to property taxes, but that (b)(1) refers to "any" taxes. AS 29.45.090 is the recodification of AS 29.53.050 as amended in 1973. Ch. 74, § 12, SLA 1985.

14. Keane contends the Incorporators' proposal will produce revenues that will range from $6,679.25 per capita to $10,613.21 per capita. These figures are derived from the DCRA's estimate of the revenues that will be produced from the proposed tax. The DCRA estimates that the three percent tax will bring in approximately $354,000 to $562,500 annually. Keane divides this amount by 53 (the number of residents according to the 1990 census).

15. The Incorporators contend that the legality of the tax is outside the scope of this review and that a challenge to the allegedly illegal tax will not affect the incorporation process. AS 29.45.710 allows incorporation of a second class city to be dependent on the passage of a tax proposition.

of property in the municipality. *All property on which a tax is levied* shall be taxed at the same rate during the year.

(b) A municipality, or combination of municipalities occupying the same geographical area, in whole or in part, may not levy taxes.

(1) that will result in tax revenues from all sources exceeding $1,500 a year for each person residing within the municipal boundaries; or

(2) *upon value that, when combined with the value of property otherwise taxable by the municipality,* exceeds the product of 225 percent of the average per capita assessed *full and true value of property* in the state multiplied by the number of residents of the taxing municipality.

(Emphasis added). When subsection (b)(1) is read in context with subsections (a) and (b)(2), it appears that the entire section is dealing with property taxes. *See* 2B Norman J. Singer, *Sutherland Statutory Construction* § 46.05 (5th ed. 1992) [hereinafter *Sutherland*] ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other so as to produce a harmonious whole.").

The LBC correctly contends that property valuation is a basic principle inherent throughout AS 29.45. We can consider these sections *in pari materia* as they relate to the method by which municipalities assess, levy and collect property taxes.[16] AS 29.45.010. *See* 2B *Sutherland, supra,* § 51.03 ("Statutes are considered to be in pari materia when they ... have the same purpose or object.").

In addition, the DCRA reports that the State Assessor interprets AS 29.45.090(b)(1) as applying only to property taxes. A "contemporaneous and practical interpretation of a statute by the executive officer[] charged with its administration and enforcement ... constitutes an invaluable aid in determining the meaning of a doubtful statute." 2B *Sutherland, supra,* § 49.03; *see also Casperson v. Alaska Teachers' Retirement Bd.,* 664 P.2d 583, 586–87 (Alaska 1983) (Compton, J., dissenting).

Furthermore, AS 29.45.090 assumes that the prohibited tax is of an amount capable of predetermination. This suggests that it applies to property tax only. As a practical matter, the amount of property tax to be levied and collected in an upcoming year is capable of exact calculation based upon the amount of assessed, taxable property in a municipality and the establishment of an annual mill rate. In contrast, the amount to be collected in a fish sales taxes in an upcoming year can only be estimated: revenues are dependent on the strength of the salmon runs and the price paid per pound to the fishermen.[17]

After considering the language of the statute, its legislative history and underlying policies, we conclude that AS 29.45.090 is inapplicable to sales taxes.[18] We believe this

16. Keane asserts that the language of AS 29.45.090(b)(1) is clear and, therefore we should not look at extrinsic evidence. However, this court has rejected such a mechanical application of the plain meaning rule. *Alaska Pub. Employees Ass'n v. City of Fairbanks,* 753 P.2d 725, 727 & n. 5 (Alaska 1988). When AS 29.45.090(b)(1) is read in context, it appears that it applies to property, not sales, taxes.

The LBC correctly points out that the statutes addressing municipal property taxation are separate from those addressing sales taxes. However, the titles of chapters and articles are not part of the general and permanent law of the state. AS 01.05.005; *see Ketchikan Retail Liquor Dealers Ass'n v. State, Alcoholic Beverage Control Bd.,* 602 P.2d 434, 438 (1979), *modified,* 615 P.2d 1391 (Alaska 1980). Nevertheless, it seems logical that the legislature would include a limitation on sales taxes in the article specifically discussing them rather than in the municipal property article.

17. We are not persuaded otherwise by Keane's argument that the per capita limit could be administered by exempting transactions after the taxpayer has paid $1,500 in other local sales taxes. It would be the taxpayer's responsibility to claim the exemption and to establish the amount of taxes already paid. Keane contends that administrative difficulties are not grounds for departing from the clear language of a statute. *See Alaska Pub. Employees Ass'n,* 753 P.2d at 728 n. 6 (holding that arguments that a statute " 'leads to too many problems,' is a matter for the legislature, not this court.").

18. Keane also argues that because the former six percent limitation on sales taxes has been repealed, AS 29.45.650(g); Ch. 159, §§ 1, 2, SLA

interpretation to be the most persuasive in light of precedent, reason and policy. *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

2. The sales tax does not violate due process.

[7] Keane argues that the three percent sales and use tax violates due process of law because it confers no benefit upon the taxpayers. The LBC contends that the City of Pilot Point plans to provide shore-based facilities and to offset the effects of the seasonal influx of fishermen to the community.[19] The Incorporators also contend that the taxpayers will benefit from the waste disposal, storage, waterfront and fresh water improvements that the city proposes to provide. Keane responds that the majority of the taxpayers have no shore-based presence.

As long as services are available, the issue of usage by the taxpayers is irrelevant. *North Slope Borough v. Puget Sound Tug & Barge*, 598 P.2d 924, 928 (Alaska 1979). Therefore, we conclude that the three percent sales and use tax does not violate the taxpayers' due process rights.

3. The sales and use tax does have a public purpose.

[8] Keane also contends that the proposed tax violates article IX, section 6 of the Alaska Constitution, which provides in part that "[n]o tax shall be levied ... except for a public purpose." Keane asserts that the three percent tax violates the public purpose clause because the Incorporators' petition anticipated the generation of fifty percent more revenue than needed to operate the city as well as the establishment of a permanent fund.[20] The LBC responds that (1) the DCRA considered the petitioner's anticipated revenues overly optimistic, and (2) even if a city has excess tax revenues it is not prohibited from establishing a savings account to draw on in less prosperous times.

The phrase "public purpose" cannot be precisely defined; each case must be judged on its own particular facts and circumstances. *DeArmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 721 (Alaska 1962).

> [I]f the object is beneficial to the inhabitants and directly connected with the local government it will be considered with favor as a ... public purpose.... To justify a court in declaring a tax invalid on the ground that it was not imposed for a public purpose, the absence of a public interest must be clear and palpable.

16 Stephen M. Flanagan, *McQuillin, Municipal Corporations* § 44.35, at 114–15 (3rd ed. 1984). We conclude that establishment of a savings account for future public purposes appears to be a prudent decision with a public purpose.

1990, there will be no barrier to excessive taxation through the device of a sales tax unless this court construes AS 29.45.090(b)(1) as a limitation on sales taxes. The LBC and Incorporators respond that (1) if AS 29.45.090(b)(1) is interpreted to include sales taxes, then the lifting of the six percent limitation would be meaningless, and (2) if AS 29.45.090(b)(1) and its predecessors applied to "all" taxes, then they were in irreconcilable conflict with the prior six-percent sales tax limitation. We agree with the LBC. The absence of a limitation on sales taxes is a matter for legislative resolution. *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 610, 101 S.Ct. 2946, 2950, 69 L.Ed.2d 884 (1981) ("[T]he appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution.").

19. Because of the salmon industry, Pilot Point's population explodes from approximately 80 persons in the winter to more than 2,500 during the summer.

20. Originally the Incorporators had desired to use some of the tax revenues for a permanent fund with dividends to be paid to the citizens of Pilot Point. However, the city's representative later suggested that the purpose of the permanent fund would be to generate revenues for the city, not for its residents. After much debate, the city council has passed an "Investment Fund Reserve Account" that provides that 25% of any sales and use taxes collected will be placed in a conservative investment portfolio to provide revenue during poor fishing seasons. There is also a provision for an "Educational Endowment Fund." The ordinances passed by Pilot Point provide for other funds that may be created as needed by resolution.

The Attorney General has opined that the Alaska Constitution does not appear to prohibit municipalities from dedicating public funds to such an account. 1988 Informal Op.Att'y Gen. No. 663–88–0525 (July 29, 1988).

D. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING A STAY

[9] Keane argues that Alaska Appellate Rule 603(a)(2) does not require any consideration of the merits of the appeal, the probability of success, a finding of irreparable harm, or adequate protection to the appellee. Keane asserts that the cases relied on by the LBC and the Incorporators that considered these elements are no longer applicable because they have been superseded by Appellate Rule 603.[21] Keane argues that a $750 cash deposit in the amount of a cost bond satisfies the requirements of a supersedeas bond under Alaska Appellate Rule 603(a)(2) by application of Alaska Appellate Rule 602(f). He cites *Pipeliners Union 798, United Association v. Alaska State Commission for Human Rights*, 681 P.2d 330 (Alaska 1984), to support the proposition that he is entitled to a stay unless it would be contrary to the public interest. The *Pipeliners* court concluded that "[a] monetary enforcement judgment may be stayed as a matter of right upon the posting of an appropriate supercedeas [sic] bond under Appellate Rule 603(a)(2)." *Id.* at 336. However, Keane's reliance on *Pipeliners* is misplaced; *Pipeliners* involved a *monetary* judgment.

The distinction between monetary and non-monetary judgments is clear in Rule 603(a)(2) which provides in part:

> When an appeal is taken, the appellant may obtain a stay of proceedings to enforce the judgment by filing a supersedeas bond.... The filing of a supersedeas bond does not prohibit the court from considering the public interest in deciding whether to impose or continue a stay on that portion of an administrative or district court judgment *which is not limited to monetary relief.*

(Emphasis added). Thus stays not involving money judgments are not mandatory upon the mere issuance of a supersedeas bond, and certainly are not mandatory on the issuance of a $750 cost bond.

[10] Accordingly, the superior court has discretion to grant a stay concerning a non-monetary judgment. This determination is guided by the "public interest." Keane contends that it was in the public interest to grant a stay because disincorporation of a municipality substantially disrupts the life and livelihood of those associated with the municipality. The LBC and the Intervenors respond that the public interest cannot be protected with a $750 cost bond: this amount does not come close to the amount spent in reviewing the incorporation petition, holding meetings and hearings, holding an election, or the loss of tax revenues if a stay is granted. Moreover, certain public interests would be advanced by *denying* the stay: the right to petition and vote for incorporation, and the right to vote for a tax measure to insure the financial viability of the city. We find the public interest arguments advanced by the LBC and the Intervenors persuasive.

Additionally, we clarify that the test presented in *A.J. Industries, Inc. v. Alaska Public Service Commission*, 470 P.2d 537 (Alaska 1970), is still applicable:

> While the rule requiring a clear showing of probable success applies in situations where the party asking for relief does not stand to suffer irreparable harm, or where the party against whom the injunction is sought will suffer injury if the injunction is issued, a different rule applies where the party seeking the injunction stands to suffer irreparable harm and where, at the same time, the opposing party can be protected from injury.

21. *See, e.g., Keystone Servs., Inc. v. Alaska Transp. Comm'n*, 568 P.2d 952 (Alaska 1977). Keystone involved the superior court's denial of a stay from a final order of the Alaska Transportation Commission, pending appeal of the order to the superior court. The *Keystone* court noted that the issue presented was similar to the issue addressed in *A.J. Industries, Inc. v. Alaska Public Service Commission*, 470 P.2d 537 (Alaska 1970), namely: "whether the superior court had properly denied a preliminary injunction in connection with an order by another regulatory agency of the state." *Id.* at 954. The court then utilized the test articulated in *A.J. Industries* to determine whether the issuance of the stay was proper. *Id.* at 954. The *A.J. Industries* test requires consideration of the following factors: (1) whether the plaintiff is faced with irreparable harm, (2) whether the opposing party will be adequately protected, and (3) whether the plaintiff has raised serious and substantial questions going to the merits of the case. *Id.*

Id. (footnotes omitted).[22]

Because Keane has made no showing of either irreparable harm or probability of success on the merits, we conclude that the superior court did not abuse its discretion in denying Keane's motion for a stay.[23]

E. THE SUPERIOR COURT DID NOT ERR IN ALLOWING THE INCORPORATORS TO INTERVENE

[11] The Incorporators argue that they were properly allowed to intervene as a matter of right. In the alternative, they argue that they were entitled to permissive intervention pursuant to Alaska Civil Rule 24(b). The LBC supports the intervention of the Incorporators, noting that "[a] newly incorporated entity has a direct interest in any legal challenge to its existence."

Keane argues that if intervention was available it was permissive, not as of right. However, Keane asserts that even permissive intervention should have been denied in this case because of the increased complications of tripartite litigation.

Assuming, *arguendo,* that intervention as a matter of right was improper, we conclude that the Incorporators were properly allowed permissive intervention. Permissive intervention is proper "when an applicant's claim or defense and the main action have a question of law or fact in common." Alaska R.Civ.P. 24(b). The Incorporators' claims do share common issues of law and fact with the LBC: they both want to uphold the LBC decision.

An additional factor that a court must consider before allowing intervention is "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* This court has recognized that "additional parties are ... the source of additional questions, briefs, objections, arguments and motions;" where no new issues are presented, it is most effective to allow participation by a brief amicus curiae rather than by intervention. *State v. Weidner,* 684 P.2d 103, 114 (Alaska 1984).

The Incorporators have raised additional arguments and interests that are not raised by the LBC, i.e., that the legality of the sales tax is not properly before the court, and that if a stay were issued, a substantial bond would be needed to cover the amount of the city's lost revenues and grants from the State and Federal governments. Furthermore, the intervention does not appear to have unduly delayed or prejudiced the original parties. Keane merely asserts that there are increased complications in tripartite litigation; he fails to persuade us that he is thereby prejudiced. Therefore, we conclude that the superior court did not abuse its discretion in allowing the Incorporators to intervene. *See id.* at 113.

F. THE SUPERIOR COURT ERRED IN ITS AWARDS OF ATTORNEY'S FEES BECAUSE KEANE WAS ENTITLED TO PUBLIC INTEREST STATUS

[12] Keane contends that the superior court abused its discretion when it denied him public interest status and awarded attorney's fees to the Incorporators and the LBC. *See Citizens Coalition for Tort Reform, Inc. v. McAlpine,* 810 P.2d 162, 171 (Alaska 1991) ("We review the trial court's determination of public interest status under the abuse of discretion standard."). We agree.

[13] The criteria for identifying a public interest suit are as follows: "(1) whether the case is designed to effectuate strong public policies; (2) whether, if the plaintiff succeeds, numerous people will benefit from the lawsuit; (3) whether only a private party could be expected to bring the suit; and (4) whether the litigant ... would lack sufficient economic incentive to bring the lawsuit if it did not involve issues of great public importance." *Carney v. State, Board of Fisheries,*

22. If the latter part of this standard comes into play, the court is to use a "balance of hardships" approach. The court will weigh "the harm that will be suffered by the plaintiff if an injunction is not granted, against the harm that will be imposed upon the defendant" if the injunction is granted. *A.J. Industries,* 470 P.2d at 540.

23. Because we conclude that the superior court did not abuse its discretion in denying the stay for the stated reasons, we do not need to reach the issue of whether the Incorporators would have been entitled to the equitable defense of laches had a stay been issued.

785 P.2d 544, 549 (Alaska 1990). All four factors must exist before a party is considered a public interest litigant. *Id.*

We conclude that Keane is a public interest litigant. First, this lawsuit was designed to effectuate public policy. Keane challenged an alleged violation of a policy of the Alaska Constitution that favors limiting tax-levying authorities. Keane also sought a determination that would clarify statutory limitations on municipalities' tax-levying powers. Each of these goals involves important public policies.

Second, numerous people will benefit from this lawsuit if Keane succeeds. Although Keane admits that "[t]he hundreds of fishermen of the Ugashik District would be the primary beneficiaries," defining boundaries of constitutional provisions will benefit the public at large. *See, e.g., Whitson v. Anchorage,* 632 P.2d 232, 234 (Alaska 1981); *Thomas v. Bailey,* 611 P.2d 536, 540 (Alaska 1980). Likewise, interpreting public laws will benefit the public. *See Girves v. Kenai Peninsula Borough,* 536 P.2d 1221, 1227 (Alaska 1975).

Third, it is reasonable to conclude that only a private party would be expected to bring this suit because the LBC's decision is supported by the DCRA.

Fourth, Keane lacked sufficient economic incentive to bring this suit. This appeal was directed at the formation of a municipality, rather than at the imposition of a tax; economic interests were affected only indirectly. Keane alleges that in this case the affected economic interest of a typical fisherman is quite small, approximately $555.55.[24] *See Citizens for the Preservation of the Kenai River, Inc. v. Sheffield,* 758 P.2d 624, 627 (Alaska 1988) (holding that whether a party is a public interest litigant depends on the interests of "typical members" rather than the interests of a single member). The economic interest of a typical fisherman in this case is not substantial and does not preclude Keane's public interest status.[25]

Keane satisfied all four of the necessary criteria to be considered a public interest litigant. We conclude that the superior court abused its discretion in denying Keane public interest status. Therefore, we reverse the awards of attorney's fees.[26]

III. *CONCLUSION*

We conclude that AS 29.05.021(b) requires an inquiry into the reasonableness and practicability of having a borough provide the desired services. Therefore, we REMAND to the LBC to make such an inquiry. We conclude that the three percent sales and use tax is not limited by AS 29.45.090(b)(1), that it does have a public purpose, and that it does not violate taxpayers' due process. We AFFIRM the decisions of the superior court denying Keane's motion to stay proceedings pending appeal and allowing the Incorporators to intervene. Finally, we conclude that Keane is a public interest litigant and therefore REVERSE the superior court's awards of attorney's fees, and REMAND the issue of attorney's fees to the superior court for redetermination.

24. Approximately 700 fishing vessels and 200 setnetters participate in the Ugashik District fishery, and anticipated tax revenues are $500,000 annually. Dividing the $500,000 annual tax revenue by the 900 taxpayers yields an average tax burden of $555.55.

25. Although we have never set a dollar amount that either precludes or establishes public interest status, we opined in *Murphy v. City of Wrangell,* 763 P.2d 229 (Alaska 1988), that it might appear that a party lacked sufficient economic incentive to bring a lawsuit when the damages are "in the low four figures." *Id.* at 233. Nonetheless, we found substantial economic incentive precluding public interest status because Murphy could have recovered up to $25,000 plus punitive damages. *Id.*

26. Because we reverse the awards of attorney's fees, it is unnecessary to discuss Keane's contention that the awards were excessive.

Petitioners for Incorporation of City and Borough of Yakutat v. Local Boundary Com'n, (Alaska 1995)

PETITIONERS FOR INCORPORATION OF CITY AND BOROUGH OF YAKUTAT, Appellant,

v.

LOCAL BOUNDARY COMMISSION, Appellee.

No. S-5760.
Supreme Court of Alaska.
April 28, 1995.
Rehearing Denied Sept. 14, 1995.

PETITIONERS FOR INCORPORATION OF CITY AND BOROUGH OF YAKUTAT, Appellant,

v.

LOCAL BOUNDARY COMMISSION, Appellee.

No. S-5760.

Supreme Court of Alaska.

April 28, 1995.

Rehearing Denied Sept. 14, 1995.

Residents of region brought petition seeking incorporation of borough, and the Local Boundary Commission (LBC) voted to approve petition after altering northwestern boundary of proposed borough. Residents appealed, and the Superior Court, First Judicial District, Juneau, Michael A. Thompson, J. pro tem., affirmed. Residents appealed, and the Supreme Court, Bryner, J. (pro tem.), held that: (1) under statute governing review of petitions for incorporation LBC is required to make preliminary finding of noncompliance with statutory guidelines before altering proposed boundaries; (2) LBC in passing on issue of compliance has broad discretion in determining what most appropriate boundaries would be; (3) LBC in amending boundary made implicit finding of noncompliance; and (4) LBC properly relied on potential future incorporation of neighboring areas in altering boundary.

Affirmed.

1. Municipal Corporations ⇐12(1)

Statute governing powers and duties of Local Boundary Commission (LBC) in reviewing petition for incorporation provides that LBC shall deny petitions that do not meet applicable standards and shall grant petitions that do; use of word shall is significant, as it indicates Legislature's intent to mandate that LBC accept petitions that meet statutory standards and reject those that fail. AS 29.05.100(a).

2. Municipal Corporations ⇐12(1)

Subsection of statute governing powers and duties of Local Boundary Commission (LBC) in reviewing petition for incorporation which provides that LBC "may" alter boundaries to meet standards was intended to allow LBC measure of discretion to mandatory rejection of non-conforming petition, which could be cured by altering proposed boundaries, that would otherwise be denied. AS 29.05.100(a).

3. Municipal Corporations ⇐5

Scope of powers of Local Boundary Commission (LBC) under statute governing review of petitions for incorporation is determined in light of constitutional provision that statute implements, which directs that boroughs embrace area and population with common interests to maximum degree possible. Const. Art. 10, § 3; AS 29.05.100(a).

4. Municipal Corporations ⇐5, 25

Provisions of statute governing rejection, acceptance, and alteration of petitions for incorporation by Local Boundary Commission (LBC) must be interpreted to require that LBC apply statutory standards for incorporation in relative sense implicit in constitutional term "maximum degree possible"; in other words, LBC is required to determine whether boundaries set out in petition embrace area and population with common interests to maximum degree possible. Const. Art. 10, § 3; AS 29.05.100(a).

5. Municipal Corporations ⇐5, 25

Under statute governing review of petitions for incorporation by Local Boundary Commission (LBC), LBC is authorized to accept petition as proposed only when originally proposed boundaries maximize common interests; when they do not, statute precludes finding of compliance and requires LBC either to reject petition outright or, if compliance with statutory standards can be achieved by altering boundaries, to exercise its discretionary power to redraw original proposal. AS 29.05.100(a).

6. Municipal Corporations ⇐25

While statute governing review of petitions for incorporation by Local Boundary Commission (LBC) requires preliminary

finding of noncompliance before boundaries of proposed borough may be altered, LBC, in passing on issue of compliance, has broad authority to decide what most appropriate boundaries of proposed borough would be. AS 29.05.100(a).

7. Municipal Corporations ⇐12(1)

Finding by Local Boundary Commission (LBC) of noncompliance with statute governing review of petitions for incorporation may be made either expressly or by implication. AS 29.05.100(a).

8. Municipal Corporations ⇐12(1)

Local Boundary Commission (LBC) in shifting boundary of proposed area of incorporation made implicit finding that proposed area failed to meet standards for incorporation where findings of LBC made clear that boundary was shifted because LBC believed affected area lacked sufficient cohesiveness to remaining area of borough and enjoyed greater ties with separate area and LBC stated that most appropriate boundaries were those reflected by its shift. AS 29.05.100(a)

9. Municipal Corporations ⇐25

Local Boundary Commission (LBC) acted within its authority in considering desirability of future incorporation of neighboring areas when it determined that proposed area of incorporation did not meet statutory standards for incorporation and amended boundary for proposed area. AS 29.05.100(a).

James T. Brennan, Hedland, Fleischer, Friedman, Brennan & Cooke, Anchorage, for appellant.

John B. Gaguine, Asst. Atty. Gen., and Charles E. Cole, Atty. Gen., Juneau, for appellee.

Beth Phillips, Birch, Horton, Bittner & Cherot, Anchorage, for amicus curiae Chugach Alaska Corp.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS and COMPTON, JJ., and BRYNER, J. Pro Tem.*

OPINION

BRYNER, Justice, pro tem.

I. *INTRODUCTION*

A group of Yakutat residents designating themselves as the Petitioners for the Incorporation of the City and Borough of Yakutat (Petitioners) filed a petition for incorporation of the City and Borough of Yakutat. The Local Boundary Commission (LBC) voted to approve the petition, but altered the northwestern boundary of the proposed borough. Petitioners appealed to the superior court, challenging the LBC's decision to redraw the proposed borough's northwestern boundary.

After the superior court affirmed the LBC's decision, Petitioners filed this appeal. Petitioners claim that the LBC exceeded its authority by altering the boundary of the proposed borough without first determining that the proposed borough, with its boundaries unaltered, would fail to meet the statutory standards for incorporation. The LBC responds that it has the discretion to revise the boundaries of a proposed borough without initially finding that acceptance of the original boundaries would result in failure to meet the standards for incorporation. Alternatively, the LBC asserts that its approval of the petition in this case with the northwestern boundary of the proposed borough modified amounted to an implicit finding that the originally proposed boundary would have violated statutory standards.

II. *FACTS AND PROCEEDINGS*

On December 26, 1990, Petitioners filed with the Department of Community and Regional Affairs (DCRA) a petition proposing the incorporation of a home rule borough and the concurrent dissolution of the City of Yakutat.[1] The petition generally described the boundaries of the proposed borough as extending along the Gulf of Alaska from Cape

* Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution.

1. The Alaska Constitution provides that "[t]he entire State shall be divided into boroughs, organized or unorganized." Alaska Const. art. X, § 3. The Alaska Constitution established the LBC to address municipal boundary issues, including borough formation, annexation, and boundary studies. Alaska Const. art. X, § 12.

Spencer at the southeastern boundary to Cape Suckling at the northwestern boundary.

The DCRA accepted the petition as correct in form and content. In August 1991, the DCRA issued a Draft Report on the petition and on proposed model borough boundaries that the DCRA had prepared for the Prince William Sound, Yakutat, and Cross Sound/Icy Straits regions.[2] The report recommended against approving the proposed Yakutat Borough on the basis that it failed to meet the statutory and regulatory standards, and instead recommended that the LBC adopt a model borough combining the Prince William Sound region with the Gulf Coast region, south to Cape Fairweather, including Yakutat.

The DCRA revised the Draft Report in response to public comment. Its Final Report recommended that the LBC reject the petition. Alternatively, the DCRA advised that if the LBC approved the petition, it should alter the northwestern boundary of the borough to conform to the location proposed in the model borough, the 141st Meridian.

After conducting extensive public hearings and holding three decisional meetings on the petition and on the model borough boundaries, on March 17, 1992, the LBC voted to approve the petition with its northwestern boundary altered from its originally proposed location at Cape Suckling to the DCRA's proposed location at the 141st Meridian.[3] On April 13, the LBC issued a Statement of Decision implementing its March 17 vote. The LBC subsequently denied Petitioners' request to reconsider the alteration of the northwestern boundary.

Petitioners thereafter appealed the LBC's alteration of the northwestern boundary to the superior court. Superior Court Judge Michael A. Thompson affirmed the LBC's approval of the petition and its alteration of the boundary. Petitioners then appealed to this court.

III. *DISCUSSION*

A. *The LBC Must Determine that the Petition is Statutorily Insufficient Before Amending Boundaries.*

Petitioners assert that the LBC has no authority to alter the boundaries of a proposed borough unless it initially determines that the borough, as proposed, would fail to meet applicable standards for incorporation. Petitioners base their claim on AS 29.05.100(a), which prescribes the LBC's powers and duties in reviewing a petition for incorporation:

> If the Local Boundary Commission determines that a proposed municipality fails to meet the standards for incorporation, it shall reject the petition. If the commission determines that the proposed municipality meets the standards, it shall accept the petition. If the commission determines that the proposed municipal boundaries can be altered to meet the standards, it may alter the boundaries and accept the petition.

Petitioners point out that the first two sentences of this provision set forth the LBC's functions in mandatory terms: if a proposed borough fails to meet the standards for incorporation,[4] the LBC "shall" reject the

2. During 1991, the DCRA, at the direction of the LBC, was preparing model borough boundary reports that covered the entire unorganized borough in Alaska. The Yakutat area was part of two model borough boundary studies. Initially, the DCRA recommended that Yakutat be included within the same model borough boundaries as the Prince William Sound area, but later recommended that Yakutat be included with Hoonah and the Cross Sound/Icy Straits communities.

3. The LBC conducted extensive public hearings on the petition and on the model borough boundaries on January 17–19, 1992. The LBC also held three decisional meetings in Anchorage on February 5 and 26, and March 17, 1992, on the Yakutat Borough petition. On February 5, the commissioners decided to consider the Yakutat petition before deciding the model boundaries for the area. On March 17, a motion was made to approve the petition with the southern boundary adjusted to Cape Fairweather and the northwestern boundary of Cape Suckling. By a 3–2 vote, the motion was amended to adjust the northwestern boundary to the 141st Meridian. The LBC decided, by a 4–1 vote, to approve the petition to incorporate the City and Borough of Yakutat as amended.

4. AS 29.05.031(a) articulates the standards for borough incorporation:

petition; if the proposed borough meets the standards, the LBC "shall" accept the petition. Given the mandatory wording of the first two sentences, Petitioners maintain that the final sentence of the provision, which allows the LBC to alter boundaries, applies only when the LBC determines that boundary changes are necessary to enable a proposed borough to meet the standards for incorporation. Petitioners contend that the LBC failed to follow the statutory procedure in amending the northwestern boundary of the proposed Yakutat Borough, because the LBC never determined that the borough, with its northwestern boundary at Cape Suckling as originally proposed, would fail to meet the statutory standards for incorporation.

The LBC responds that it possesses "the broad power of accepting the petition, rejecting the petition, or altering the petition so that it would meet the statutory standards." The LBC notes that its authority to alter boundaries is established by the third sentence of AS 29.05.100(a), which states, "[i]f the commission determines that the proposed municipal boundaries can be altered to meet the standards, it may alter the boundaries and accept the petition." The LBC reads this sentence as giving it unrestricted discretion to alter the boundaries of a proposed borough, provided that the altered boundaries meet the standards for incorporation. However, the LBC makes the mistake of reading the third sentence of AS 29.05.100(a) in isolation and out of context. "[T]his court interprets each part or section of a statute with every other part or section, so as to create a harmonious whole." *Rydwell v. Anchorage School Dist.*, 864 P.2d 526, 528 (Alaska 1993) (citing *Forest v. Safeway Stores, Inc.*, 830 P.2d 778, 781 (Alaska 1992)). When the third sentence of AS 29.05.100(a) is read in conjunction with the preceding sentences of the provision, the LBC's proposed interpretation makes little sense.

[1, 2] The first two sentences of AS 02.05.100(a) provide that the LBC "shall" deny petitions for incorporation that do not meet applicable standards and that it "shall" grant petitions that do. Use of the word "shall" in these sentences is significant, for it indicates the legislature's intent to mandate that the LBC accept petitions that meet the statutory standards and reject those that fail. *Fowler v. City of Anchorage*, 583 P.2d 817, 820 (Alaska 1978) ("Unless the context otherwise indicates, the use of the word 'shall' denotes a mandatory intent.") In context, then, the third sentence of subsection (a), by providing that the LBC "may" alter boundaries "to meet the standards," was apparently intended to allow the LBC a measure of discretion that would otherwise be denied by the first two sentences—the discretion to avoid mandatory rejection of a non-conforming petition when the petition's failure to meet applicable standards could be cured by altering its proposed boundaries.

The specific wording of the statute's third sentence supports this contextual meaning. In the language of the third sentence, which permits the LBC "to alter the boundaries and accept the petition" if the "boundaries can be altered *to meet the standards*," the legislature's choice of the purposive phrase "to meet the standards" plainly suggests that any alteration of boundaries must be for the purpose of achieving compliance with the standards for incorporation. This purpose necessarily presupposes a threshold determination by the LBC that the originally proposed boundaries would not meet the applicable standards.

> An area that meets the following standards may incorporate as a home rule, first class, or second class borough:
>
> (1) the population of the area is interrelated and integrated as to its social, cultural, and economic activities, and is large and stable enough to support borough government;
>
> (2) the boundaries of the proposed borough conform generally to natural geography and include all areas necessary for full development of municipal services;
>
> (3) the economy of the area includes the human and financial resources capable of providing municipal services; evaluation of an area's economy includes land use, property values, total economic base, total personal income, resource and commercial development, anticipated functions, expenses, and income of the proposed borough;
>
> (4) land, water, and air transportation facilities allow the communication and exchange necessary for the development of integrated borough government.

Moreover, if the third sentence of AS 29.05.100(a) were interpreted to give the LBC discretion to amend proposed boundaries without a preliminary finding of statutory noncompliance, then the first two sentences of the statute would become superfluous, since their use of the word "shall" would essentially be stripped of its commonly understood mandatory effect.[5]

In short, we find unpersuasive the LBC's proposal to read AS 29.05.100(a) as empowering it to alter boundaries of proposed boroughs without any preliminary finding of noncompliance. This conclusion, however, requires us to consider the breadth of the LBC's power to reject a petition as failing to meet the statutory standards for incorporation.

In the present case, Petitioners fault the LBC for proceeding to determine what would be the "most appropriate boundary" for the proposed Yakutat Borough without first determining if the boundaries proposed in the original petition for incorporation were minimally sufficient to meet the statutory standards for incorporation. Petitioners' position is essentially that, prior to a finding of noncompliance, the LBC's sole legitimate power under AS 29.05.100(a) is to review a petition for compliance with statutory standards and to accept the petition when it does meet those standards; in Petitioners' view, if a petition's boundaries, as proposed, are minimally sufficient to meet statutory standards, the LBC is barred from any consideration of the most appropriate boundary. We find this to be an unduly constricted view of the LBC's powers under AS 29.05.100(a).

[3] The scope of the LBC's powers under AS 29.05.100(a) is to be determined in light of the constitutional provision that the statute implements. Article X, section 3 of the Alaska Constitution provides, in relevant part:

> The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests *to the maximum degree possible.*

(Emphasis added.)

[4] To avoid conflict with the constitutional mandate that each borough "embrace an area and population with common interests to the maximum degree possible," the provisions of AS 29.05.100(a) dealing with the rejection, acceptance, and alteration of proposed boroughs must be interpreted to require that the LBC apply the statutory standards for incorporation in the relative sense implicit in the constitutional term "maximum degree possible." In other words, AS 29.05.100(a) must be construed to mean that, in deciding if the statutory standards for incorporation have been met, the LBC is required to determine whether the boundaries set out in a petition embrace an area and population with common interests to the maximum degree possible.

[5] Thus read, AS 29.05.100(a) authorizes the LBC to accept a petition for incorporation, as proposed, only when the originally proposed boundaries maximize common interests; when they do not, the statute precludes a finding of compliance and requires the commission either to reject the petition outright or, if compliance with statutory standards can be achieved by altering boundaries, to exercise its discretionary power to redraw the original proposal. An informed decision as to whether boundaries proposed in a petition for incorporation maximize the common interests of the area and population and thus meet the applicable statutory standards presupposes a thorough consideration of alternative boundaries and a decision as to what boundaries would be optimal. For this reason, in discharging its duties under AS 29.05.100(a), the LBC is inevitably called upon to undertake precisely the type of inquiry that Petitioners allege to be improper:

5. *See Alaska Transp. Comm'n v. Airpac, Inc.*, 685 P.2d 1248, 1253 (Alaska 1984) ("There is a presumption that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used.") (quoting 82 C.J.S. *Statutes* § 316 (1953)).

an inquiry into the "most appropriate boundaries" for the proposed borough.

[6] In summary, by requiring that each borough "embrace an area and population with common interests to the maximum extent possible," article X, section 3 of the Alaska Constitution necessarily vests the LBC with power to find non-compliance when the boundaries originally described in a petition for incorporation do not maximize common interests. Thus, although AS 29.05.100(a) requires a preliminary finding of non-compliance before the boundaries of a proposed borough may be altered, the LBC, in passing on the issue of compliance, has broad authority to decide what the most appropriate boundaries of the proposed borough would be.

B. *The LBC Impliedly Found that the Yakutat Borough, as Proposed, Would Fail to Meet the Standards for Incorporation.*

[7] This leads us to the issue of whether the LBC's findings in the present case comport with the requirements of AS 29.05.100(a). It is undisputed that the LBC made no express finding of non-compliance before deciding to alter the northwest boundary of the proposed Yakutat Borough. Petitioners contend that the lack of an express finding requires reversal of the LBC's decision. However, in *Valleys Borough Support Committee v. Local Boundary Commission*, 863 P.2d 232, 234–35 (Alaska 1993), we determined that the LBC had "impliedly found" that a petition for borough incorporation failed to meet applicable standards. Concluding that this implied finding was rationally based, we went on to uphold the LBC's decision. *Id.* at 234. As the LBC correctly argues in the present case, *Valleys Borough* establishes that a finding of non-compliance under AS 29.05.100(a) may be made either expressly or by implication. Thus, the critical question here is whether an implied finding of non-compliance can be gleaned from the record.

To resolve this question, it is useful to consider the circumstances under which we determined that an implied finding had been made in *Valleys Borough*. In *Valleys Borough*, the LBC voted to reject outright one of two competing petitions for borough incorporation. *Id.* at 233. In explaining the basis for its rejection, the LBC had stated that the area within the support committee's petition was "not cohesive enough *at this time* to [be] within the same *organized* borough." *Id.* On appeal we deemed the LBC's phrase, "not cohesive enough" to be a reference to the statutory standard for incorporation set forth in AS 29.05.031(a)(1), which requires the LBC to find that the population of a proposed borough "is interrelated and integrated as to its social, cultural, and economic activities." *Id.* at 234. On this basis, we held that the LBC had impliedly found a lack of compliance with AS 29.05.031(a)(1). *Id.*

The obviousness of the implied reference to AS 29.05.031(a)(1) in *Valleys Borough* was established by language from this court's earlier ruling in *Mobil Oil Corp. v. Local Boundary Commission*, 518 P.2d 92, 98 (Alaska 1974), *quoted in Valleys Borough*, 863 P.2d at 234, where we characterized the LBC's task as involving "[a] determination whether an area is cohesive and prosperous enough for local self-government." The phrasing of the LBC's finding was thus a close paraphrasing of this court's own description of the standards for incorporation.

[8] The situation in the present case is analogous. The findings contained in Conclusion # 3 of the LBC's Statement of Decision in this case make it plain that the LBC shifted the northwest boundary of the proposed Yakutat Borough from Cape Suckling to the 141st Meridian because the commission believed that the affected area lacked sufficient cohesiveness to the remaining area of the borough and enjoyed greater ties and common interests with the Prince William Sound area.[6] Indeed, the basis for the

6. Although the individual findings in Conclusion # 3 are not listed by number in the Statement of Decision, they are obviously distinct, and we refer to them by numbers corresponding to their listed order. Pertinent here are findings # 7, 9, 10, 11, and 18:

Finding # 7: Land ownership by Yakutat residents in the area west of the 141st meridian is minimal compared to the size of the area.

LBC's action is evident from the title it gave to Conclusion # 3 of its Statement of Decision: "*THE MOST APPROPRIATE* BOUNDARIES FOR THE CITY AND BOROUGH OF YAKUTAT EXTEND FROM THE 141ST MERIDIAN IN THE WEST TO THE SOUTHERN BOUNDARY LAST PROPOSED BY PETITIONERS, A LINE DRAWN FROM THE TOP OF MOUNT FAIRWEATHER TO CAPE FAIRWEATHER." (Emphasis added.)

Because the LBC based its decision that the 141st Meridian was the most appropriate boundary for the proposed borough on criteria reflecting the common interests of the area and its population, and because the LBC plainly meant its decision to ensure that the area and population to be included in the approved borough would be maximally cohesive, the decision itself was tantamount to a declaration that the originally proposed boundaries did not comply with the standards for incorporation—that they failed to "embrace an area and population with common interests *to the maximum degree possible.*" [7]

In this respect, the LBC's decision in the current case corresponds closely to its *Valleys Borough* finding that the petition was not "cohesive enough ... to [be] within the same organized borough." We hold here, as we did in *Valleys Borough*, that the LBC impliedly determined that the petition, as submitted, failed to meet the standards for incorporation.

Finding # 9: The Emergency Air Service contract for the Icy Bay logging camp is held by a Yakutat air company; however, major landowners in the disputed territory believe that activity in the area, and the development of its resources, will look to Prince William Sound rather than Yakutat.

Finding # 10: The transportation links to the area west of the 141st meridian, limited to boat and unscheduled flights, are somewhat more attenuated than in the other parts of the borough.

Finding # 11: The petitioners established use of the western area by Yakutat residents; however, it is used to a much lesser extent than the area to the east of the 141st. For example, information in the petition indicated only 2% to 26% of households used various areas west of the 141st for subsistence purposes.

Finding # 18: The LBC did not consider model borough boundaries in reaching its decision on the Yakutat borough petition as model boundaries for the area have not yet been adopted. However, the LBC did consider the impact of the Yakutat proposal on the adjacent regions.

C. *The LBC Did Not Rely On Improper Criteria in Amending the Proposed Boundary.*

Petitioners lastly argue that, even if the LBC's decision were construed as determining that the originally proposed borough boundaries failed to meet the statutory standards for incorporation, the LBC based its decision on non-statutory criteria and therefore erred. In advancing this argument, Petitioners rely primarily on the LBC's consideration of the possible future creation of a Prince William Sound Borough and of interests voiced by Chugach Alaska Corporation, a regional Native corporation based primarily in Prince William Sound whose boundary under the Alaska Native Land Claims Settlement Act is drawn at the 141st Meridian.

[9] Petitioners' arguments, however, reflect the mistaken premise that the LBC must approve any minimally acceptable petition for incorporation and has only limited authority to consider or adopt "the most desirable" borough boundaries. Given the Alaska Constitution's mandate that boroughs be cohesive "to the maximum degree possible," [8] the LBC acted well within the purview of its authority in considering the desirability of future incorporation of neighboring areas such as Prince William Sound and the interests of affected land owners and users such as the Chugach Alaska Corporation.[9] We

7. Alaska Const., art. X, § 3 (emphasis added).

8. Alaska Const., art. X, § 3.

9. In their reply brief, Petitioners challenge the authority of the LBC to promulgate regulations such as 19 AAC 10.060(a)(1), which expressly authorized the LBC to consider "land use and ownership patterns" in determining compliance with the statutory standards set out in AS 29.05.031(a). *See, e.g., Warner v. State,* 819 P.2d 28, 32 n. 3 (Alaska 1991); *State v. Anderson,* 749 P.2d 1342, 1345 (Alaska 1988). We need not decide the issue, since even in the absence of the challenged regulations, the LBC clearly had authority to consider information and arguments

find no merit to Petitioners' claim of improper reliance on non-statutory criteria.

IV. *CONCLUSION*

As we have emphasized on previous occasions, "the Local Boundary Commission has been given a broad power to decide in the unique circumstances presented by each petition whether borough government is appropriate." *Mobil Oil*, 518 P.2d at 98–99. We have similarly emphasized that "[t]he standards for incorporation set out in AS 07.10.030 were intended to be flexibly applied to a wide range of regional conditions." *Id.* at 98. Here, "we perceive in the record a reasonable basis of support for the Commission's reading of the standards and its evaluation of the evidence." *Id.* at 99. Accordingly, we affirm the LBC's acceptance of the incorporation petition, as modified.

AFFIRMED.

John and Helen BRODIGAN, Appellants,

v.

ALASKA DEPARTMENT OF REVENUE, Appellee.

No. S–6193.

Supreme Court of Alaska.

July 28, 1995.

Applicants for permanent fund dividend sought judicial review of revenue department finding that they were ineligible. The Superior Court, Third Judicial District, Anchorage, Glen C. Anderson, J., affirmed and awarded department attorney fees. Applicants appealed. The Supreme Court, Eastaugh, J., held that: (1) department was justified in concluding that applicants' seasonal change of residence on advice of physicians did not qualify as allowable absence for medical treatment; (2) department acted within its statutory authority in promulgating regulation prohibiting absences for medical treatment if treatment included seasonal change of residence; (3) department was justified in concluding that applicants' absence was not temporary and thus was not allowable; (4) department's ruling did not create irrebuttable presumption of nonresidency based on specific period of absence so as to violate applicants' substantive due process rights; and (5) department was entitled to portion of its attorney fees.

Affirmed.

1. States ⇐127

State revenue department was justified in concluding that absence of husband and wife from state due to physicians' recommendation that husband spent coldest winter months in warmer climate due to his heart condition was not allowable absence for "medical treatment" as used in statute and regulation dealing with permanent fund dividend. AS 43.23.095(8); Alaska Admin. Code title 15, § 23.175(c).

See publication Words and Phrases for other judicial constructions and definitions.

2. States ⇐127

State revenue department acted within its statutory authority in promulgating regulation pursuant to which absence from state for medical treatment was not allowable absence for purposes of permanent fund dividend where treatment included seasonal change of residence; while statute allowed absences for medical treatment, department reasonably concluded that absence for such purpose did not encompass physicians' advice that applicant should spend colder winter months in warmer climate. AS 43.23.095(8)(D); Alaska Admin. Code title 15, § 23.42.175(c)(6).

such as those presented by the Chugach Alaska Corporation in addressing the statutory standards articulated in AS 29.05.031(a). In particular, we note that AS 29.05.031(a)(1) gives the LBC power to consider whether "the population of the area [included in the proposed borough] is interrelated and integrated as to its social, cultural, and economic activities."

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186 P.3d 571, Mullins v. Local Boundary Commission, (Alaska 2008)

MARGARET A. MULLINS, Appellant,

v.

LOCAL BOUNDARY COMMISSION AND STATE OF ALASKA DIVISION OF ELECTIONS, Appellees.

No. S-12912.
Supreme Court of Alaska.
March 12, 2010.

Margret A. MULLINS, Appellant,

v.

LOCAL BOUNDARY COMMISSION, and State of Alaska Division of Elections, Appellees.

No. S–12912.

Supreme Court of Alaska.

March 12, 2010.

Background: Resident appealed Local Boundary Commission (LBC) decision to approve petition for incorporation of borough, and she sought stay of election. She also sought to amend complaint to add Division of Elections. The Superior Court, Fourth Judicial District, Fairbanks, Randy M. Olsen, J., denied stay and dismissed lawsuit as moot after voters rejected incorporation. Resident appealed.

Holdings: The Supreme Court, Fabe, J., held that:

(1) Superior Court's procedural errors did not require reversal, and

(2) election rendered resident's claims moot.

Affirmed.

1. Appeal and Error ⇐949

Supreme Court reviews superior court's procedural decisions for abuse of discretion.

2. Appeal and Error ⇐842(1)

Supreme Court reviews questions of mootness under the independent judgment standard.

3. Pretrial Procedure ⇐678

Granting motion to dismiss only one week after it was served on plaintiff by mail and before she responded was abuse of discretion; plaintiff had eighteen days to file her opposition. Rules Civ.Proc., Rules 6(c), 77(c)(2)(ii).

4. Municipal Corporations ⇐12(12)

Superior court's failure to allow resident adequate time to respond to motion to dismiss administrative appeal as moot, since voters rejected incorporation of borough, did not prejudice resident and, therefore, did not require a reversal; resident filed opposition to dismissal and motion to vacate, and superior court then considered resident's position and arguments. Rules Civ.Proc., Rules 6(c), 77(c)(2)(ii).

5. Municipal Corporations ⇐12(12)

Supreme Court's de novo review of merits of Local Boundary Commission's (LBC) motion to dismiss resident's administrative appeal as moot, since voters rejected incorporation of borough, would cure any prejudice that resident potentially suffered from the superior court's procedural error by dismissing appeal without allowing resident time to respond. Rules Civ.Proc., Rules 6(c), 77(c)(2)(ii).

6. Appeal and Error ⇐348(1)

Superior court's failure to mail dismissal order until four days after it was entered or clarification order until seven days after it was entered did not prejudice plaintiff and, therefore, did not require reversal because the time for appeal, review, and reconsideration of the written order did not begin until the date shown in the clerk's certificate of distribution. Rules Civ.Proc., Rule 58.1(b, c).

7. Municipal Corporations ⇐12(12)

Providing resident with wrong phone number for hearing on motion for preliminary injunction against election to incorporate borough would not merit reversal of the court's decision; resident was able to join the hearing after a short delay of 17 minutes and was provided with an opportunity to be heard after the court summarized the part of the hearing she missed, and the court made no substantive rulings, but only set a briefing schedule.

8. Action ⇐6

A court will generally not consider questions where events have rendered the legal issue moot.

9. Action ⇐6

A claim is "moot" if it has lost its character as a present, live controversy or if the

party bringing the action would not be entitled to any relief even if it prevails.

See publication Words and Phrases for other judicial constructions and definitions.

10. Municipal Corporations ⇦12(12)

Vote against incorporation of borough rendered moot resident's appeal of Local Boundary Commission's (LBC) decision to approve petition; the vote voided the approval decision and provided the principal relief that resident sought in her appeal to the superior court.

11. Action ⇦6

Even if claims are moot, a court may still hear them if they fall within the public interest exception to the mootness doctrine.

12. Action ⇦6

In determining whether the public interest exception to mootness doctrine applies, a court considers whether (1) the disputed issues are capable of repetition, (2) the mootness doctrine, if applied, may repeatedly circumvent review of the issues, and (3) the issues presented are so important to the public interest as to justify overriding the mootness doctrine; no factor is dispositive.

13. Municipal Corporations ⇦12(12)

Local Boundary Commission's (LBC) approval of petition to incorporate borough, and its allegedly arbitrary finding that the petition satisfied regulatory requirements for incorporation, did not fall under the public interest exception to mootness after voters rejected petition; a similar petition would not likely be filed with and approved by the LBC, and it would not likely repeat the allegedly erroneous findings and approval decision. Alaska Admin. Code tit. 3, § 110.650.

14. Appeal and Error ⇦781(1)

Court deciding whether moot issue evades judicial review and public interest exception should apply compares the time it takes to bring the appeal with the time it takes for the appeal to become moot.

15. Municipal Corporations ⇦12(12)

Resident's complaints regarding Local Boundary Commission's (LBC) exclusion of minority groups from process for incorporating borough, insufficient distribution of informational documents, and reliance on a meeting closed to the public did not fall within public interest exception to mootness doctrine after voters rejected incorporation. AS 44.62.310(a), (f), (h)(2).

16. Administrative Law and Procedure ⇦705

Where a decision allegedly in violation of Open Meetings Act is no longer in effect, a court should conduct a standard mootness analysis to determine whether to address the claim. AS 44.62.310 et seq.

17. Administrative Law and Procedure ⇦725

A party may not unilaterally add a complaint against a third party to a pending administrative appeal by amending the pleadings.

18. Municipal Corporations ⇦12(12)

Superior court, acting as intermediate court of appeal to review an administrative decision of Local Boundary Commission (LBC) to approve petition for incorporation of borough, properly declined to review resident's claims against the Division of Elections regarding the incorporation election, as they were unrelated to the LBC's decision that was under review. AS 22.10.020(a, d).

19. Municipal Corporations ⇦12(12)

Resident's claims against Division of Elections regarding election to incorporate borough were not properly before Supreme Court, since they were not properly before superior court on administrative appeal of Local Boundary Commission (LBC) decision to approve petition.

20. Elections ⇦271

Even where final judgment is not rendered prior to the election, election procedures can still be challenged by anyone opposing the outcome. AS 15.20.540.

21. Municipal Corporations ⇦108.10

Constitutionality of tax agreement with mining company was not reviewable following its defeat in referendum election to incorporate borough.

Margret A. Mullins, pro se, Delta Junction.

Marjorie L. Vandor, Assistant Attorney General, and Richard A. Svobodny, Acting Attorney General, Juneau, for Appellees.

Before: CARPENETI, Chief Justice, FABE, WINFREE, and CHRISTEN, Justices.

OPINION

FABE, Justice.

I. INTRODUCTION

Margret Mullins filed a suit in superior court challenging the decision of the Local Boundary Commission (LBC) to approve a petition for incorporation of the Deltana Borough. She sought to stay the election in which voters would decide whether to incorporate the proposed borough. The superior court denied Mullins's motion to stay the election, and when voters overwhelmingly rejected the incorporation of the proposed borough, the superior court dismissed her lawsuit as moot. Mullins appeals. Because only declaratory relief is available to Mullins on claims presented to the superior court, and because claims of this nature are not likely to consistently escape judicial review, we affirm the superior court's dismissal of the lawsuit on mootness grounds.

II. FACTS AND PROCEEDINGS

A. Facts

On January 3, 2006, 259 voters in the Delta–Greely region filed a "Petition to the Local Boundary Commission for Incorporation of the Deltana Borough, a Unified Home–Rule Borough" seeking to incorporate as a borough the Delta–Greely Regional Educational Attendance Area. Staff for the LBC published a preliminary report in November 2006 and a final report in February 2007, both of which recommended approval of the petition. The LBC received written public comments on the petition and the preliminary report.

On March 16, 2007, the LBC held a public hearing on the petition in Delta Junction, which was attended by 251 people. Prior to the hearing, the five members of the LBC, along with two staff, toured parts of the proposed borough by vehicle. The following day, the LBC convened a decisional meeting and granted the petition by unanimous vote. This decision was memorialized in a written statement of decision, issued on April 12, 2007, in which the LBC made factual findings that the standards for borough incorporation were met. Seven requests for reconsideration were filed by the public, including one request filed by Mullins, challenging numerous aspects of the statement of decision. These requests were all denied after public meetings.

On May 11, 2007, the LBC notified the Alaska Division of Elections of its approval of the petition and directed the Division to order a referendum election on the proposed incorporation of the Deltana Borough. The Division ordered a vote-by-mail election, with an election date of August 21, 2007. The election's purpose was to decide: (1) whether to incorporate the Deltana Borough; (2) whether to approve certain prerequisites to incorporation, including an "Agreement for Payment in Lieu of Taxes" between Delta Junction and Teck–Pogo, Inc., a mining company (the "Pogo PILOT agreement") and taxes on heating fuel, vehicle gas, and electrical power; and (3) who the mayor and borough assembly members would be if the borough were incorporated. The vote-by-mail election was held as scheduled and the residents of the proposed Deltana Borough voted overwhelmingly against the borough incorporation and also rejected the combined ballot question regarding the Pogo PILOT agreement and proposed taxes.

In response to several complaints filed prior to the election, the ombudsman for the State of Alaska investigated the LBC's process of approving the petition. In the final report, not issued until March 30, 2009, the ombudsman found a number of irregularities in the LBC's process, including a failure to issue adequate public notice, a failure to accommodate the substantial Russian language minority in the region, and a failure to engage in "government-to-government consultation" with the Mendas Cha–Ag Tribe at Healy Lake.

B. Proceedings

On June 11, 2007, after the final request for reconsideration of the LBC's approval of the petition was denied and before the incorporation election was held, Mullins filed an appeal before the superior court challenging the LBC's decision. Her appeal was heard by Superior Court Judge Randy M. Olsen. Mullins raised twenty-two points on appeal, alleging that the LBC committed numerous errors in approving the petition and challenging various election procedures. Mullins later attempted to amend her appeal to add claims directly against the Director of Elections.

On July 9, Mullins moved for a preliminary injunction to stay the election, and she requested an expedited hearing on her motion. The superior court held a hearing on July 20 to consider Mullins's motion. Mullins, who was to participate by telephone, did not call in to the hearing until approximately seventeen minutes after it began, apparently because she had the wrong number. At the hearing, the court stated that it would issue a decision on Mullins's motion to stay the election by July 27—three days before ballots were to be sent out. On July 27, the superior court denied Mullins's motion. Mullins's request for reconsideration of this decision was denied on August 22, 2007, one day after the election.

After the Director of Elections certified the vote against incorporation of the Deltana Borough, the LBC moved to dismiss Mullins's administrative appeal as moot, arguing that the vote against incorporation "rendered void" the LBC's decision to approve the petition and that "no relief is available" to Mullins. The superior court granted this motion and dismissed Mullins's appeal on October 5, only four days after the LBC's motion was filed. Mullins filed an opposition to the LBC's motion to dismiss on October 17 and, on October 23, a "Motion and Affidavit for this Court To Vacate Its Order Dismissing this Case in Its Entirety, and Protest against the Violations of this Pro Se and Public Interest Appellant's Civil Rights, Including the Denial of Due Process of Law by this Court." On November 21, the superior court issued an order of clarification reaffirming its dismissal of Mullins's lawsuit as moot.

III. STANDARD OF REVIEW

[1, 2] Mullins requests that we review all decisions made by the superior court. She lists forty-seven alleged errors, both procedural and substantive, in her statement of points on appeal. We review the superior court's procedural decisions for abuse of discretion.[1] We review questions of mootness under the independent judgment standard.[2]

IV. DISCUSSION

In her administrative appeal, Mullins identified legitimate problems with the process leading up to the approval of the petition to incorporate the Deltana Borough. But the public has now rejected the incorporation of the proposed borough, as Mullins urged it to do. The question before us, then, is whether there is further relief to be granted to Mullins, and if not, whether an exception to the mootness doctrine should apply to this appeal.

Mullins's allegations fall roughly into three categories: (1) alleged procedural errors by the superior court; (2) alleged defects in the approval of the petition by the LBC; and (3) alleged defects in the election process. We address each allegation of error in turn.

A. Alleged Procedural Errors by the Superior Court

Mullins alleges that the superior court made a series of procedural errors while considering her administrative appeal: that the superior court ruled on the LBC's motion to dismiss the complaint without affording Mullins an opportunity to file an opposition; that the superior court delayed sending Mullins the order of dismissal and order of clarification; and that the superior court gave Mullins the wrong call-in number for the July 20 hearing. She argues that these claimed errors violated her constitutional

1. *Walker v. Walker,* 151 P.3d 444, 447 (Alaska 2007).

2. *Akpik v. State, Office of Mgmt. & Budget,* 115 P.3d 532, 534 (Alaska 2005).

rights and require us to reverse the dismissal of her appeal.

[3–5] Mullins first complains that the superior court failed to allow her adequate time to respond to the LBC's motion to dismiss. Her claim has merit—it was an abuse of discretion to rule on the LBC's motion only one week after it was served on Mullins, well before the eighteen days in which Mullins had to file her opposition had elapsed.[3] But the superior court's failure to allow Mullins adequate time to respond does not require a reversal of its decision because Mullins can show no resulting prejudice.[4] After the superior court made its initial ruling, Mullins filed an opposition to the LBC's motion to dismiss the appeal as moot and then a motion to vacate the superior court's dismissal of her lawsuit as moot. Thereafter, the court issued an order of clarification reaffirming the dismissal of the appeal. Because the superior court considered Mullins's position and arguments regarding why her appeal should not be dismissed as moot, Mullins was not prejudiced by the court's premature decision.[5] Moreover, we now apply our independent judgment in deciding the LBC's motion to dismiss the case on mootness grounds without reference to the opinion of the superior court. Our de novo review of the merits of the LBC's motion to dismiss will cure any prejudice that Mullins potentially suffered from the superior court's procedural error.[6]

[6] Mullins expresses further concern that the superior court did not mail its order of dismissal until four days after it was entered or its order of clarification until seven days after it was entered. This delay in distribution caused no prejudice to Mullins because the time for appeal, review, and reconsideration of the written order did not begin until the date shown in the clerk's certificate of distribution.[7] It therefore does not require us to reverse the dismissal of Mullins's appeal.

[7] Finally, Mullins complains that the superior court provided her with the wrong phone number for the July 20 hearing on her motion for a preliminary injunction. Even if the court accidentally provided Mullins with an incorrect number for the hearing,[8] such a mistake would not merit reversal of the court's decision. Mullins was able to join the hearing after a short delay and, after the court summarized the part of the hearing she missed, she was provided with an opportunity to be heard. Furthermore, the court made no substantive rulings at or based on the July 20 hearing but only set a briefing schedule.

We thus conclude that none of the alleged procedural errors by the superior court support the reversal of its dismissal of Mullins's appeal.

B. Alleged Substantive Errors by Superior Court in Dismissing Case as Moot

The crux of Mullins's appeal is that it was error to dismiss her administrative appeal as

3. The LBC's motion was served by mail on Mullins on September 28, 2007. Pursuant to Rule 77(c)(2)(ii) of the Alaska Rules of Civil Procedure, a party has fifteen days from the date of service to file an opposition to a motion to dismiss. This deadline is extended by three days if service is made by mail, as it was in this case. Alaska R. Civ. P. 6(c). Mullins should have had eighteen days, until October 16, to respond to the LBC's motion. Instead, the superior court dismissed her lawsuit on October 5.

4. *Boggess v. State,* 783 P.2d 1173, 1182 (Alaska App.1989) (''Even [where] discretion is abused, reversal will be required only upon a showing of prejudice.'').

5. *See Johnson v. Johnson,* 544 P.2d 65, 71 (Alaska 1975) (holding no due process violation where party denied opportunity to be heard on issue is later afforded opportunity to brief and argue merits through motion for reconsideration).

6. *See Brooks v. Brooks,* Mem. Op. & J. No. 0993, 2000 WL 34545824, at *2 (Alaska 2000) (''[A]ny procedural error was harmless, since our review of the merits of the superior court's written decision will cure any prejudice that [appellant] potentially suffered from flaws in the procedures that led to its entry.'') (citing *Sanuita v. Common Laborer's & Hod Carriers Union of America,* 402 P.2d 199, 202–03 (Alaska 1965)).

7. Alaska R. Civ. P. 58.1(b), (c).

8. While Mullins stated at the hearing that the clerk sent her the wrong dial-in code by e-mail, it appears that the clerk mailed and phoned Mullins with the correct code.

moot because questions of the legality of the LBC's conduct and the election remain "unadjudicated." In Mullins's administrative appeal to the superior court, she alleged that the LBC made the following errors in approving the petition: (1) improperly finding that the proposed borough satisfied the regulatory requirements for incorporation; (2) excluding Slavic and Native populations from the incorporation process; (3) failing to adequately distribute informational materials to the public; and (4) violating the Open Meetings Act by using information gathered during a private tour of the proposed borough in making its decision. She also challenged the incorporation election procedures, including the use of a mail-in ballot, the proposed schedule for counting ballots, the combining of the vote on borough incorporation with the vote for borough officials in the same election, and the combining of the vote on the Pogo PILOT agreement and the vote on taxes in the same ballot question. Mullins requested that the superior court stay the election, order that the incorporation vote be conducted separately from and prior to the election of borough officials, order that the vote on the Pogo PILOT agreement and taxes be presented as separate questions, and direct the LBC to begin the incorporation process from scratch.

The superior court initially dismissed Mullins's appeal in a summary order. After Mullins filed two additional briefs with the superior court, the court issued a two-paragraph Order of Clarification stating, in its entirety:

> The court was assigned to hear an appeal of the Local Boundary Commission decision. Although multiple defects in the underlying proceedings were alleged, the end result of the vote of the community was to frustrate any effect of the Local Boundary Commission decision.
>
> Because the court was assigned as an appeals court, it was not acting as a trial court. Any complaints about the underlying proceedings would only be considered on the question as to whether the decision should be reversed. The court would not, as an appeal court, hear new evidence or make decisions on any matter except whether to reverse or affirm the decision. Accordingly, the appeal was not the place to consider complaints, except as they would affect the appeal. Because there is no need to reverse the decision, which no longer has any effect, and is moot, the case has been dismissed. New filings will not be addressed.

[8, 9] We apply our independent judgment in determining whether Mullins's appeal of the LBC's approval of the petition was properly dismissed as moot.[9] A court will generally not consider questions "where events have rendered the legal issue moot." [10] A claim is moot "if it has lost its character as a present, live controversy" or "if the party bringing the action would not be entitled to any relief even if it prevails." [11]

1. Alleged wrongdoing by the LBC

[10] It is clear that Mullins's complaints against the LBC were mooted by the election. Mullins appealed the LBC's decision to approve the petition, seeking to have the superior court overturn the decision based on various alleged defects in the approval process. The vote against incorporation voided the approval decision and provided the principal relief that Mullins sought in her appeal to the superior court.[12]

9. *See Akpik v. State, Office of Mgmt. & Budget,* 115 P.3d 532, 534 (Alaska 2005).

10. *Kodiak Seafood Processors Ass'n v. State,* 900 P.2d 1191, 1195 (Alaska 1995).

11. *Ulmer v. Alaska Rest. & Beverage Ass'n,* 33 P.3d 773, 776 (Alaska 2001) (quoting *Gerstein v. Axtell,* 960 P.2d 599, 601 (Alaska 1998)).

12. These facts can be analogized to challenges to administrative permitting decisions where the permits are no longer valid, but permit opponents still seek declaratory judgment that the agency actions relating to the permits were unlawful. We have regularly found such appeals to be moot. *See, e.g., Akpik,* 115 P.3d at 534–35 (holding challenge to agency's decision not to accept comments on proposed exploratory drilling project and to approve project to be moot where project was completed and project permits had expired); *State, Dep't of Natural Res. v. Greenpeace, Inc.,* 96 P.3d 1056, 1068 (Alaska 2004) (holding challenge to agency's decision to lift stay on issuance of permit to be moot where permit had expired); *Kodiak Seafood Processors,* 900 P.2d at 1196 (holding challenge to agency's

[11, 12] Even if claims are moot, a court may still hear them if they fall within the public interest exception to the mootness doctrine. In determining whether the public interest exception applies, a court considers: "(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may repeatedly circumvent review of the issues, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine." [13] "None of these factors is dispositive; each is an aspect of the question of whether the public interest dictates that a court review a moot issue." [14] The proper inquiry in this case is not only whether the LBC's challenged approval decision falls under the public interest exception, but also whether the underlying wrongful conduct alleged by Mullins does.[15]

[13] The LBC's approval of the petition, and its allegedly arbitrary finding that the petition satisfied regulatory requirements for incorporation, do not fall under the public interest exception because it is unlikely that a similar petition will be filed with and approved by the LBC, and such approval decisions can be, and often are, the subject of legal review. First, regulations prevent the LBC from accepting a substantially similar petition for two years after such a petition is rejected by voters.[16] And as a practical matter, the LBC is highly unlikely to approve the same petition after it was so overwhelmingly rejected by voters. If and when another petition is submitted, even tracing the same boundaries as the petition submitted in January 2006, the LBC must again review whether the petition satisfies the criteria for incorporation, a highly fact-specific inquiry.[17] It is unlikely that the allegedly erroneous findings and approval decision will be repeated. Second, citizens have the right to appeal decisions of the LBC under the Administrative Procedure Act.[18] These decisions, including the LBC's interpretation and application of regulations concerning incorporation, are regularly challenged in court and do not evade review.[19] Therefore, even accepting that they are issues of public importance, the approval of the petition by the LBC, and any errors in applying regulatory criteria for incorporation, are moot and will not be considered under the public interest exception.

[14, 15] Mullins's remaining complaints regarding the LBC's conduct relate to public participation: exclusion of minority groups from the incorporation process, insufficient distribution of informational documents, and reliance on a meeting closed to the public in making its decision. Such problems are arguably capable of repetition, although the facts in each instance may vary slightly.[20] Moreover, failure to adequately inform and include the public in decision-making is a

decision to issue exploratory permit to be moot where permit was revoked before trial, but considering merits under public interest exception).

13. *Ulmer,* 33 P.3d at 777–78.

14. *Kodiak Seafood Processors,* 900 P.2d at 1196.

15. In formulating the test for applying the public interest exception, we have referred to "disputed issues" rather than "claims." *See id.; see also Akpik,* 115 P.3d at 535 (noting that a court "may address *certain issues* if they fall within the public interest exception" and proceeding to analyze issues raised by appellant underlying his mooted challenge to an agency decision) (emphasis added).

16. 3 Alaska Administrative Code 110.650 (2009).

17. *See Ulmer,* 33 P.3d at 778 (indicating that proper scope of inquiry for first prong of public interest exception test in challenge to initiative petition summary language is limited to whether *specific* language of initiative and summary is likely to be repeated).

18. AS 29.05.100(b).

19. *See, e.g., Petitioners for Incorporation of City & Borough of Yakutat v. Local Boundary Comm'n,* 900 P.2d 721 (Alaska 1995) (reviewing alteration of incorporation petition by the LBC); *Keane v. Local Boundary Comm'n,* 893 P.2d 1239 (Alaska 1995) (reviewing approval of incorporation petition by the LBC); *Lake & Peninsula Borough v. Local Boundary Comm'n,* 885 P.2d 1059 (Alaska 1994) (reviewing approval of incorporation petition by the LBC); *Valleys Borough Support Comm. v. Local Boundary Comm'n,* 863 P.2d 232 (Alaska 1993) (reviewing the LBC's decision to select one incorporation petition over another).

20. Indeed, the ombudsman found that the LBC has demonstrated a "pattern" of failing to adequately engage in consultation with Alaska Natives when making decisions.

matter of public importance. But complaints regarding public participation do not repeatedly evade judicial review. We analyze this prong of the public interest exception test "by comparing the time it takes to bring the appeal with the time it takes for the appeal to become moot." [21] There is no reason to believe that the time between the approval of a petition by the LBC based on inadequate public participation and the incorporation election is insufficient to permit judicial review.[22] Even when it is, public participation claims remain live and can be adjudicated where the public votes *for* incorporation. In *Lake and Peninsula Borough v. Local Boundary Commission*, for example, certain villages appealed the LBC's approval of an incorporation petition subsequently approved by voters in part on the grounds that the LBC provided inadequate notice during the incorporation process.[23] The superior court found that notice was defective, a ruling we affirmed, and the LBC was directed to remedy its notice violations.[24] We thus find that Mullins's public participation claims are moot and do not fall within the public interest exception.

Mullins specifically alleges that the LBC violated the Open Meetings Act (OMA) by using information gathered during a private tour of the proposed borough in making its decision.[25] She argues that this claim is not moot, relying on our statement in *Alaska Community Colleges' Federation of Teachers, Local No. 2404 v. University of Alaska* (*ACCFT*) that "[t]he mootness bar is especially inappropriate in OMA cases." [26] In *ACCFT*, the plaintiff sought to void a governmental decision on the grounds that it had been reached at a private meeting.[27] At the superior court's direction, the decision-making body held a properly noticed open meeting at which it affirmed its previous decision.[28] The court then dismissed the lawsuit without ruling on whether the original meeting violated the OMA, finding that any violation had been remedied.[29] We reversed the dismissal and remanded the case to the superior court to determine whether a violation of the OMA occurred and if so, whether the subsequent meeting remedied the violation.[30]

[16] Unlike in *ACCFT*, the LBC's approval decision was not reaffirmed at a curative meeting, and it is not still in effect. Mullins, unlike the plaintiff in *ACCFT*, cannot obtain the substantive relief she seeks because the LBC's decision allegedly made in violation of the OMA has been voided by subsequent events. Where a decision is still in effect when an OMA claim is brought, the holding in *ACCFT* requires that a court review the alleged OMA violation even if a curative meeting was held. Where a decision is no longer in effect, as is the case here, a court should conduct a standard mootness

21. *Copeland v. Ballard,* 210 P.3d 1197, 1202 (Alaska 2009).

22. *See Ulmer,* 33 P.3d at 778 ("Although such appeals typically must be decided by election day to avoid becoming moot, there is no reason to believe that we cannot resolve such appeals in a timely fashion. Indeed, we have frequently done that.") (internal citations omitted); *O'Callaghan v. State,* 920 P.2d 1387, 1388–89 (Alaska 1996) (holding appeal of election result moot, and declining to apply public interest exception because if issues were repeated, "a timely election challenge would be possible").

23. 885 P.2d 1059, 1060–61 (Alaska 1994).

24. *Id.* at 1062–63, 1067.

25. The Open Meetings Act requires "[a]ll meetings of a governmental body of a public entity of the state [to be] open to the public" with limited exceptions not applicable in this case. AS 44.62.310(a). "Meeting" is defined as "a gathering of members of a governmental body when . . . a matter upon which the governmental body is empowered to act is considered by the members collectively." AS 44.62.310(h)(2). An actual decision need not be reached at the meeting for the statute to apply. *See Brookwood Area Homeowners Ass'n, Inc. v. Municipality of Anchorage,* 702 P.2d 1317, 1323 (Alaska 1985). An OMA violation may be cured by "holding another meeting in compliance with notice and other requirements of this section and conducting a substantial and public reconsideration of the matters considered at the original meeting." AS 44.62.310(f).

26. 677 P.2d 886, 889 (Alaska 1984).

27. *Id.* at 888.

28. *Id.*

29. *Id.*

30. *Id.* at 892–93.

analysis to determine whether to address the OMA claim. In this case, for the reasons described above, Mullins's public participation challenge to LBC's private car tour as a violation of the OMA is moot and we will not consider it.[31]

2. Alleged violations in the election

Mullins's initial pleading in her administrative appeal of the LBC's approval decision included allegations of wrongdoing by the Division of Elections in structuring the incorporation election. Mullins later attempted to amend her pleading to add a complaint against the Director of Elections as a defendant and request changes to the upcoming election as relief, titling her amended pleadings an "Amended Notice of Appeal & Complaint." The superior court never accepted Mullins's addition of a complaint against the Director of Elections—its final Order of Clarification continued to list the LBC as the only party adverse to Mullins and noted that Mullins's "appeal was not the place to consider complaints."

[17–19] A party may not unilaterally add a complaint against a third party to a pending administrative appeal by amending the pleadings, as Mullins attempted to do in this case. The superior court is operating under the authority of different statutory provisions when it acts as an appellate court [32] and a trial court of general jurisdiction [33] and these roles are not generally combined in the same lawsuit.[34] The superior court, acting in its capacity as an intermediate court of appeal to review an administrative decision,[35] properly declined to review Mullins's claims against the Division of Elections regarding the incorporation election, as they were unrelated to the LBC's decision that was under review. Because the claims regarding the incorporation election were not properly before the superior court, they are not properly before us; the only claims properly before us on appeal are those relating to the LBC's decision to approve the petition.

[20, 21] If Mullins wished to sue the Division of Elections, she should have filed an independent lawsuit. Now that the election has passed, it is highly likely that such a lawsuit would be moot.[36] A superior court can no longer direct the Division of Elections to change the format and procedures of the incorporation election, as requested by Mullins in her improper amended pleadings. Nor does Mullins seek to void the results of the election. The only relief available to Mullins for alleged errors in the election would be a declaratory judgment—there are no live issues. Moreover, these alleged errors are unlikely to evade judicial review. There is no reason to assume that courts cannot decide challenges related to an election before election day.[37] Even where final judgment is not rendered prior to the election, election procedures can still be challenged by anyone opposing the outcome.[38]

31. Mullins also appeals the superior court's denial of her motion for a preliminary injunction staying the election. But the preliminary injunction motion was based on the alleged wrongdoing of the LBC, and these claims are moot for the reasons discussed above.

32. *See* AS 22.10.020(d).

33. *See* AS 22.10.020(a).

34. It may in some instances be appropriate for a superior court to consolidate a *separately* filed administrative appeal and lawsuit concerning the same set of facts.

35. *See* Alaska R.App. P. 601–612 (establishing rules for superior court acting as an intermediate appellate court).

36. *See, e.g., Peloza v. Freas,* 871 P.2d 687, 688 (Alaska 1994) (holding pre-election challenge to refusal to place candidate on ballot to be mooted by election); *Falke v. State,* 717 P.2d 369, 371 (Alaska 1986) (holding pre-election action seeking to remove candidate from ballot to be mooted by election in which candidate lost); *see also Grady v. State,* Mem. Op. & J. No. 1110, 2002 WL 31529075, at *1 (Alaska Nov. 13, 2002) (holding pre-election action seeking ruling that candidate forfeited nomination to be mooted by election in which candidate lost).

37. *See supra* note 22.

38. *See* AS 15.20.540 (establishing election challenge procedures whereby ten qualified voters can challenge the approval or rejection of any question or proposition on the grounds of "misconduct, fraud, or corruption on the part of an election official" or "any corrupt practices as defined by law sufficient to change the results of the election.").

In this case, Mullins does not oppose the election results and her challenges to the incorporation election, even if filed as an independent lawsuit, would almost certainly be moot.[39]

V. CONCLUSION

The superior court correctly dismissed Mullins's administrative appeal as moot. For the reasons detailed above, we AFFIRM.

EASTAUGH, Justice, not participating.

James APONE, Appellant,

v.

FRED MEYER, INC., Appellee.

No. S–12748.

Supreme Court of Alaska.

March 19, 2010.

Background: Workers' compensation claimant sought judicial review of Workers' Compensation Board's denial of benefits. The Superior Court, Third Judicial District, Anchorage, Stephanie E. Joannides, J., affirmed the Board, and claimant appealed.

Holdings: The Supreme Court, Carpeneti, J., held that:

(1) Board did not fail to recognize claimant's expert, or improperly consider her opinion;

(2) Board did not impermissibly discount chiropractor's expert opinion;

(3) testimony of independent medical examination (IME) physician was sufficient to support Board's finding that claimant failed to establish a compensable claim;

(4) Board did not breach any duty owed a pro se claimant; and

(5) evidence was insufficient to support claimant's allegation hearing officer was biased.

Affirmed.

1. Workers' Compensation ⚿1964

In a workers' compensation appeal from the superior court, the Supreme Court independently reviews and directly scrutinizes the board's decision; factual findings are reviewed to see if they are supported by substantial evidence.

2. Administrative Law and Procedure ⚿791

"Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

See publication Words and Phrases for other judicial constructions and definitions.

3. Workers' Compensation ⚿1939.4(4), 1939.7

In deciding whether substantial evidence supports a finding by the Workers' Compensation Board, the Supreme Court does not reweigh the evidence or choose between competing inferences, but simply determines whether such evidence exists.

39. Mullins also challenges the constitutionality of the Pogo PILOT agreement that was placed on the ballot. We have established a "general rule ... that a court should not determine the constitutionality of an initiative unless and until it is enacted." *State v. Trust the People,* 113 P.3d 613, 614 n. 1 (Alaska 2005); *see also Kodiak Island Borough v. Mahoney,* 71 P.3d 896, 898 (Alaska 2003) ("Courts will not review the constitutionality of the substantive initiative proposal until and unless the voters pass the ordinance."); *Brooks v. Wright,* 971 P.2d 1025, 1027 (Alaska 1999) ("[g]eneral contentions that the provisions of an initiative are unconstitutional are justiciable only after the initiative has been enacted by the electorate" (quoting *Boucher v. Engstrom,* 528 P.2d 456, 460 n. 13 (Alaska 1974))). Pursuant to this rule, a court should not review the constitutionality of the defeated Pogo PILOT agreement even if raised in an independent lawsuit.

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226 P.3d 1012, Petitioners v. Local Boundary Commission, (Alaska 2008)

PETITIONERS FOR the DISSOLUTION OF the CITY OF SKAGWAY AND INCORPORATION OF A SKAGWAY BOROUGH, Appellant,

v.

LOCAL BOUNDARY COMMISSION, Appellee.

No. S-12376.
Supreme Court of Alaska.
July 3, 2008.

oral argument before us that not requiring actual or constructive notice as an element of a prima facie case effectively makes a store owner the insurer of his property or puts the burden of proving notice or reasonableness on the store owner. We disagree with these assertions. We held in *Webb* that in adopting a general standard of negligence, we were not making a landowner the insurer of his property.[15] As in any negligence case, the plaintiff still has the burden of showing that the defendant owed him a duty, that the defendant breached that duty, that he was injured, and that the breach of duty was the proximate cause of his injury.[16] Evidence of notice or lack thereof may be relevant to the question whether a defendant breached a duty of care and therefore should go to the fact finder.[17]

V. CONCLUSION

We HOLD that actual or constructive notice of a hazardous condition is not an element of a prima facie case in a slip-and-fall action against a grocery store owner in Alaska.

PETITIONERS FOR the DISSOLUTION OF the CITY OF SKAGWAY AND INCORPORATION OF A SKAGWAY BOROUGH, Appellant,

v.

LOCAL BOUNDARY COMMISSION, Appellee.

No. S–12376.

Supreme Court of Alaska.

July 3, 2008.

Background: After its petition for dissolution of city and to incorporate borough was approved, following judicial review and remand to the Local Boundary Commission, citizens' group filed motion for all attorney fees incurred in appeal, alleging that it qualified as a public interest litigant. The Superior Court, First Judicial District, Juneau, Patricia A. Collins, J., found that citizens' group could not invoke public interest litigant exception to the attorney fee schedule. Citizens' group appealed.

Holding: The Supreme Court, Matthews, J., held that citizens were not public interest litigants because they filed petition at the behest of city.

Affirmed.

1. Costs ⇐194.42

The test to determine whether the public interest litigant exception to the attorney fee schedule is applicable requires that: (1) the case be designed to effectuate strong public policy; (2) numerous people would benefit from the suit if successful; (3) only a private party could have been expected to bring the suit; and (4) the litigant lacked sufficient economic incentive to bring the suit. Rules Civ.Proc., Rule 82.

2. Appeal and Error ⇐984(5)

The applicable standard of review of a superior court's determination of a party's status as a public interest litigant, for purposes of the public interest litigant exception to the attorney fee schedule, is abuse of discretion. Rules Civ.Proc., Rule 82.

3. Costs ⇐194.42

Finding that citizens filed petition for dissolution of city and to incorporate borough at the behest of city precluded a finding that they were "public interest litigants" as would entitle citizens to an exception to the attorney fee schedule for their attorney fees on

15. *Webb v. City and Borough of Sitka,* 561 P.2d 731, 734 (Alaska 1977).

16. *Alvey v. Pioneer Oilfield Servs., Inc.,* 648 P.2d 599, 600 (Alaska 1982) (citing *Larman v. Kodiak Elec. Ass'n,* 514 P.2d 1275, 1279 (Alaska 1973)).

17. *See Wickwire v. Arctic Circle Air Servs.,* 722 P.2d 930, 931, 933 (Alaska 1986).

appeal from the Local Boundary Commission's initial denial of the petition, despite citizens' claim that city could not have instituted appeal because it could not bring due process and equal protection claims against the State; citizens prevailed on statutory, not constitutional grounds, and citizens would not be deemed independent of the city to circumvent public interest litigant test. U.S.C.A. Const.Amend. 14; Rules Civ.Proc., Rule 82.

4. Costs ⇨194.42

The public interest litigant exception to the attorney fee schedule does not apply where the litigation was, or could have been, initiated by a public entity such as a local government. Rules Civ.Proc., Rule 82(a).

Robert P. Blasco, Robertson, Monagle & Eastaugh, Juneau, for Appellant.

Michael G. Mitchell, Assistant Attorney General, Anchorage, Talis J. Colberg, Attorney General, Juneau, for Appellee.

Before: FABE, Chief Justice, MATTHEWS, EASTAUGH, and CARPENETI, Justices.

OPINION

MATTHEWS, Justice.

I. INTRODUCTION

Petitioners appeal the superior court's ruling that they do not qualify as public interest litigants and thus cannot invoke an exception to the attorney's fee schedule set forth in Alaska Civil Rule 82. The exception does not apply if the suit was or could have been brought by a public entity. Here, the City of Skagway could have brought—and, through Petitioners, evidently did bring—the suit at issue. We thus affirm that the public interest litigant exception is not available to Petitioners, and Rule 82 applies.

II. FACTS AND PROCEEDINGS

In 2001 "Petitioners for the Dissolution of the City of Skagway and the Incorporation of a Skagway Borough" (Petitioners) filed a petition with the Local Boundary Commission to dissolve the City of Skagway and form the Borough of Skagway. The Commission denied the petition. Petitioners appealed the Commission's decision in the superior court alleging that the Commission had improperly adopted and imposed a new legal requirement in violation of due process and the Administrative Procedure Act (APA). The court ruled in favor of Petitioners and remanded the matter to the Commission.[1]

In September 2005 Petitioners filed a motion for attorney's fees in which they made a "prevailing party" claim for *all* fees incurred in the appeal. The Commission opposed the motion; it conceded that Petitioners were the prevailing party but argued that they were entitled "only to an award of *partial* attorney's fees" under Civil Rule 82. (Emphasis in original.) Petitioners replied, asserting that, as public interest litigants, they were entitled to an award of full reasonable attorney's fees. The Commission moved for and was granted leave to submit additional briefing on the issue of Petitioners' status as public interest litigants. In its supplemental brief, the Commission disputed that Petitioners were public interest litigants, because, it asserted, it was "the City of Skagway [that] bankrolled the action, directed it, and is the real litigant here."

[1] The superior court held oral argument and issued a written decision on January 11, 2006, in which it applied a well-established test to determine whether the public interest litigant exception applies.[2] The test requires that (1) the case be designed to effectuate strong public policy; (2) numerous people would benefit from the suit if successful; (3) only a private party could have been expected to bring the suit; and (4) the litigant lacked sufficient economic incentive to bring the suit.[3] The court found that

1. The petition was eventually approved in 2007.

2. It should be noted that in 2003 the Alaska Legislature modified and redirected the public interest litigant exception. *See* AS 09.60.010(b); ch. 86, § 2, SLA 2003. The case at hand was filed prior to September 11, 2003—the effective date of the act.

3. *See, e.g., Matanuska Elec. Ass'n v. Rewire the Bd.,* 36 P.3d 685, 696 (Alaska 2001) (citing *Kenai*

Petitioners met the first three criteria. As to the fourth criterion, the court concluded that it "lack[ed] sufficient detailed information of the petitioners' identities and economic interests (or lack thereof)" to determine whether Petitioners sufficiently lacked financial incentive to bring the suit. The court gave the parties fifteen days to submit "evidence of the make-up of the Skagway petitioners' group and their economic interest, if any."

The Commission moved for reconsideration of the order. It disputed the court's finding that Petitioners had met the third part of the test requiring that only a private party could have brought the suit.[4] The Commission took issue with the court's determination that "[t]he City of Skagway could not have brought this suit against the Commission because it is prohibited from bringing due process and equal protection claims against the state." On the contrary, the Commission asserted, the City could have brought the same suit under the APA and, "for all practical purposes *did* [ ] bring it." The Commission requested that, in the event that its motion was denied (which it was), the court "evaluate the evidence that [would] be submitted in response to its Order to determine whether it shows that the 'Petitioners for the Dissolution of the City of Skagway . . .' is a group that actually exists and functions separately from and independently of the City."

In response to the court's request for supplemental evidence, Petitioners submitted thirty-three affidavits from various members of the group, each of which stated that the individual affiant had "nothing to gain financially from the appeal." The court noted that Petitioners' affidavits amounted to "satisfactory evidence illustrating that, individually, most of the members assert that they lack sufficient economic incentive to bring suit." For its part, the Commission submitted an affidavit from a local government specialist and numerous additional documents, which, it claimed, showed

> (1) that economic incentives did drive the petition and the appeal; (2) that the City, as well as the individuals collectively, had economic interests in suing in their own right; and (3) that they petitioned and appealed in order to protect their own local economic interests, and not to effectuate any strong public policies beyond protecting their own interests.

Based on the evidence submitted by the Commission, the court found that "Petitioners were controlled and acting at the behest of Skagway." Based on that finding it held that "Petitioners [were] therefore not entitled to public interest litigant status."

Petitioners appeal the superior court's determination that they are not public interest litigants. They assert that the court misapplied the four-part test and erroneously gave undue weight to the role of the City of Skagway, a non-party to the litigation whose interests, Petitioners argue, are not germane to the appeal.

III. DISCUSSION

A. Standard of Review

[2] The applicable standard of review of a superior court's determination of a party's status as public interest litigants is abuse of discretion.[5] Under this standard, the lower court's decision should be reversed only where it appears to be "manifestly unreasonable or motivated by an inappropriate purpose." [6] Where the decision depends on findings of fact made by the trial court, such findings must be upheld unless they are clearly erroneous.[7]

B. The Public Interest Litigant Exception to Rule 82 Does Not Apply to Government–Initiated Litigation.

[3] Alaska Rule of Civil Procedure 82(a) provides for partial recovery of attorney's

Lumber Co. v. LeResche, 646 P.2d 215, 222–23 (Alaska 1982)).

4. *Rewire the Bd.,* 36 P.3d at 696.

5. *See Fairbanks N. Star Borough v. Interior Cabaret, Hotel, Rest. & Retailers Ass'n,* 137 P.3d 289, 291 (Alaska 2006).

6. *Kenai Lumber Co. v. LeResche,* 646 P.2d 215, 222 (Alaska 1982) (citation omitted).

7. Alaska R. Civ. P. 52(a); *see also Alaska N. Dev., Inc. v. Alyeska Pipeline Serv. Co.,* 666 P.2d 33, 39 (Alaska 1983).

fees for the prevailing party in a civil suit.[8] This court has developed an exception to this rule in cases "involving issues of genuine public interest" to prevent the rule "from deter[ring] citizens from litigating questions of general public concern for fear of incurring the expense of the other party's attorney's fees." [9] The offensive corollary to this "protective" exception is that where a public interest litigant *prevails*, the litigant is not limited to the partial recovery scheme set forth in Rule 82 but can, rather, recover up to one hundred percent of its attorney's fees.[10]

[4] This policy-driven exception does not apply where, as here, the litigation was, or could have been, initiated by a public entity such as a local government. As noted above, the third part of the test requires that "only a private party could be expected to bring the suit." [11] The superior court found that the City of Skagway—a public entity—controlled the petition and ensuing appeal. Given the evidence submitted by the Commission, this finding is not clearly erroneous [12] and we may not disturb it. Petitioners are essentially acting as private attorneys general on behalf of the City's interests and the broader public interest that is consistent with the City's interests. The City would be precluded from claiming public interest litigant status here, and it follows that this bar should apply to parties litigating in its stead.[13]

Petitioners argue that the City of Skagway could not have instituted the appeal, because, as the superior court noted, the City was "prohibited from bringing due process and equal protection claims against the state." This argument lacks merit. Petitioners ultimately prevailed on statutory, not constitutional grounds. The City could have raised this argument with the same result. Even assuming that Petitioners' victory could only have been secured by raising the constitutional due process argument and that the City would have been barred from raising this argument, this would not be a sufficient reason to permit an agent of the City (here, Petitioners) to be considered independent of the City for purposes of circumventing the third part of the public interest litigant test. The litigation still would be brought at the behest of the City.

Last, asserting that the court erred in "considering supplemental briefing and a supplemental affidavit from the Local Boundary Commission without allowing the Petitioners any opportunity to respond," Petitioners have requested that, in the event that we affirm the superior court's ruling, we remand to allow them further briefing on the issue. We decline to do so. Petitioners were put on notice by the Commission's motion for reconsideration of January 24, 2006, that the Commission claimed that the City controlled the litigation. Petitioners filed affidavits subsequent to this motion but chose not to focus on the issue of City control. Further, they do not claim that the court's conclusion regarding City control is factually as distinct from legally wrong. As to the latter point they have had a full opportunity for briefing in this court.

8. Where, as here, a case goes to trial but no money judgment is awarded, the prevailing party can recover thirty percent of its fees, although the court has broad latitude to vary the award at its discretion. Alaska R. Civ. P. 82(b)(2)-(3).

9. *Kenai Lumber Co.,* 646 P.2d at 222 (quotations and citation omitted); *see also Gilbert v. State,* 526 P.2d 1131, 1136 (Alaska 1974) (holding that "[i]t is an abuse of discretion to award attorney's fees against a losing party who has in good faith raised an issue of genuine public interest before the courts").

10. *See State v. Native Vill. of Nunapitchuk,* 156 P.3d 389, 392 n. 2 (Alaska 2007) (citing *Anchorage v. McCabe,* 568 P.2d 986, 989–91 (Alaska 1977) and *Gilbert,* 526 P.2d at 1136).

11. *E.g., Rewire the Bd.,* 36 P.3d at 696 (citing *Kenai Lumber Co.,* 646 P.2d at 222–23).

12. *See Alaska N. Dev.,* 666 P.2d at 39.

13. Petitioners argue that our decision in *Hickel v. Southeast Conference,* 868 P.2d 919 (Alaska 1994), compels a contrary result. In *Hickel,* we upheld an award of attorney's fees and costs to the Mat–Su Borough and other litigants, all of whom claimed public interest litigant status. *Id.* at 922. In that case, however, the state did not contest the litigants' public interest status, *id.,* so the issue of whether the borough, a public entity, qualified as a public interest litigant was not properly before us; we did not purport to pass on it.

IV. CONCLUSION

The decision of the superior court is AFFIRMED.

Rick MORRIS, Appellant,

v.

STATE of Alaska, DEPARTMENT OF ADMINISTRATION, DIVISION OF MOTOR VEHICLES, Appellee.

No. S–12279.

Supreme Court of Alaska.

July 3, 2008.

Background: After driver's driver's license was revoked based on driver submitting to a chemical breath test that revealed an alcohol concentration of .08 percent or more, driver sought administrative review. The hearing officer affirmed the revocation. Driver appealed. The Superior Court, Third Judicial District, Kenai, Harold M. Brown, J., affirmed. Driver appealed.

Holding: The Supreme Court, Carpeneti, J., held that substantial evidence supported the hearing officer's decision to revoke driver's driver's license following his arrest for driving under the influence (DUI).

Affirmed.

1. Administrative Law and Procedure ⚿683

Where the superior court was acting as an intermediate court of appeal, the Supreme Court will independently review the hearing officer's determination.

2. Administrative Law and Procedure ⚿791, 796

The Supreme Court reviews issues of law not involving agency expertise under the substitution of judgment standard and the hearing officer's factual findings under the substantial evidence test, determining whether the findings are supported by such evidence as a reasonable mind might accept as adequate to support a conclusion.

3. Administrative Law and Procedure ⚿786, 791

When an agency chooses between conflicting determinations and there is substantial evidence in the record to support either conclusion the Supreme Court will affirm the agency's findings.

4. Automobiles ⚿411, 415

A driver in a license revocation proceeding has the right to challenge the accuracy of a breath alcohol test, which includes the right to obtain evidence of an independent blood test producing an exculpatory result.

5. Automobiles ⚿144.2(10.2)

Substantial evidence supported the hearing officer's decision to revoke driver's license following arrest for driving under the influence (DUI); a preliminary breath test indicated that defendant had a breath alcohol content of .092 percent, a later breath test revealed a result of .089 percent, the breath test machine's internal self-tests were performed both before and after driver's tests, driver admitted that he had consumed alcohol before driving, officer stated that driver had red and glassy eyes, slurred speech, and a flushed face. AS 28.35.030(a)(2), 28.35.033(d).

6. Automobiles ⚿144.2(3)

Where a hearing officer administratively suspends a driver's license, the Supreme Court reviews the record to determine whether the hearing officer's decision is supported by substantial evidence.

Peter F. Mysing, Kenai, for Appellant.

Margaret Paton Walsh, Assistant Attorney General, Anchorage, and David W. Márquez, Attorney General, Juneau, for Appellee.

Before: FABE, Chief Justice, MATTHEWS, EASTAUGH, and CARPENETI, Justices.

361 P.3d 926, City and Borough of Juneau v. State, (Alaska 2015)

CITY & BOROUGH OF JUNEAU, Appellant and Cross-Appellee,

v.

State of Alaska, LOCAL BOUNDARY COMMISSION, Appellee.

Nos. S-15502,S-15512.
Supreme Court of Alaska.
December 4, 2015.

or court determined the "actual attorney's fees which were necessarily incurred," [21] accepting some of Dr. Brandner's objections in the process, and applied the proper formula to that sum. "[T]he [superior] court is under no obligation to give reasons for an award that complies with the percentages expressed in Rule 82(b)(2)." [22]

V. CONCLUSION

The superior court did not err in granting summary judgment to the defendants because Dr. Brandner did not produce any evidence that the defendants' actions caused his injuries. Nor did the superior court abuse its discretion in ordering Dr. Brandner to pay attorney's fees and costs associated with his motion to continue. We therefore AFFIRM the superior court's judgment.

STOWERS, Chief Justice, and MAASSEN, Justice, not participating.

CITY & BOROUGH OF JUNEAU, Appellant and Cross–Appellee,

v.

STATE of Alaska, LOCAL BOUNDARY COMMISSION, Appellee,

and

Petitioners for Incorporation of the Petersburg Borough, Appellee and Cross–Appellant.

Nos. S–15502, S–15512.

Supreme Court of Alaska.

Dec. 4, 2015.

Background: Neighboring borough petitioned for review of decision of local Boundary Commission granting city's petition to dissolve itself and incorporate a new borough, over objection of neighboring borough, which had sought to annex some of area included in new borough. The Superior Court, First Judicial District, Juneau, Louis J. Menendez, J., affirmed. Neighboring borough appealed.

Holdings: The Supreme Court, Winfree, J., held that:

(1) Commission was not required to conduct head-to-head analysis as between dissolving city and neighboring borough to determine whether city had superior common interests to contested area, in order to satisfy its constitutional obligation to make borough decisions from a statewide perspective prior to granting city's petition, and

(2) trial court's decision to award less than 30% portion of city's requested attorney fees was not manifestly unreasonable.

Affirmed.

1. Municipal Corporations ⚿18

The "de facto municipal incorporation doctrine" precludes disincorporation when incorporation is attempted under a proper statute, a good faith effort is made to comply with the statute, the statute is colorably complied with, and the municipality has exercised its powers in good faith.

See publication Words and Phrases for other judicial constructions and definitions.

2. Administrative Law and Procedure ⚿683

As a general rule, the Supreme Court approaches issues independently of the Superior Court when that court acts as an intermediate court of appeal.

3. Administrative Law and Procedure ⚿741

The Supreme Court applies different standards of review to agency decisions depending on the subject of review.

21. Alaska R. Civ. P. 82(b)(2).

22. *Nichols,* 6 P.3d at 305.

4. Administrative Law and Procedure ⇦760

In a review of agency action, the Supreme Court substitutes its judgment for that of the agency when interpreting the Alaska Constitution.

5. Costs ⇦252

The amount of attorney's fees to award is a matter committed to the sound discretion of the trial courts, when sitting as intermediate appellate tribunals. Rules App.Proc., Rule 508(e).

6. Constitutional Law ⇦580

In construing a constitutional provision, the Supreme Court must give it a reasonable and practical interpretation in accordance with common sense and consonant with the plain meaning and purpose of the provision and the intent of the framers.

7. Municipal Corporations ⇦7

Local Boundary Commission was not required to conduct head-to-head analysis as between dissolving city and neighboring borough to determine whether city seeking to dissolve itself and incorporate new borough had superior common interests to contested area sought to be incorporated by new borough, in order to satisfy its constitutional obligation to make borough decisions from a statewide perspective prior to granting city's petition; rather, Commission was only required to determine whether proposed borough embraced an area with common interests to maximum degree possible, which presupposed thorough consideration of alternative boundaries and a decision as to what boundaries would be optimal. Const. Art. 10, § 3; AS 29.05.031, 29.05.100(a).

8. Municipal Corporations ⇦12(13)

Superior Court's decision to award city only $1,500 in prevailing party attorney fees, on administrative appeal from decision granting its petition to dissolve itself and incorporate new borough, over neighboring borough's objection, as opposed to $9,594, or 30% of fees requested, was not manifestly unreasonable; despite arguably lengthy administrative record, complexity of arguments, and importance of issues on appeal, court had discretion whether to award such fees at all. Rules App.Proc., Rule 508(e).

9. Administrative Law and Procedure ⇦686

In administrative appeals, the extent to which litigants have been involved in prior administrative proceedings, and the cost thereof, as well as the nature of judicial review and its cost, are factors which a trial court may wish to consider in determining the application of rule governing recovery of attorney fees; likewise, the importance to the litigants of rights asserted is a factor to be considered. Rules App.Proc., Rule 508(e).

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James T. Brennan and Sara E. Heideman, Hedland, Brennan and Heideman, Anchorage, for Appellee/Cross–Appellant Petitioners for Incorporation of the Petersburg Borough.

Before: FABE, Chief Justice, WINFREE, STOWERS, MAASSEN, and BOLGER, Justices.

OPINION

WINFREE, Justice.

I. INTRODUCTION

The primary issue in this appeal is whether the State of Alaska's Local Boundary Commission (Boundary Commission) violated the Alaska Constitution when it approved the incorporation of a new borough over the objection of an existing borough seeking to annex some of the area included in the new borough. We conclude that the Boundary Commission's decision complied with constitutional requirements and therefore affirm the superior court's decision upholding the Boundary Commission's incorporation decision.

II. FACTS AND PROCEEDINGS

In April 2011 the City of Petersburg petitioned the Boundary Commission to dissolve the City and incorporate a new borough. The proposed Petersburg Borough "consist[ed] of approximately 3,365 square miles of land and 982 square miles of water for a total of 4,347 square miles of land and water." In August the Boundary Commission accepted the petition and published notice.

In October the City and Borough of Juneau notified the Boundary Commission "of its intent to file an annexation petition that will pertain to some of the same boundaries as are at issue in the petition recently filed by the City of Petersburg." Juneau intended to annex almost half of the area sought for the Petersburg Borough, explaining that its proposed annexation petition and Petersburg's incorporation petition "will overlap with respect to 1906 square miles" that had "previously been identified by the Local Boundary Commission as the 'unorganized remnant' of the City and Borough of Juneau." Juneau requested that the Boundary Commission postpone the Petersburg proceedings "to allow for concurrent consideration and action (or possible consolidation as authorized by 3 AAC 110.430)" on the two petitions.[1]

In November Juneau submitted its annexation petition. Boundary Commission staff recommended denying Juneau's consolidation request, explaining that the Boundary Commission would have Juneau's annexation petition, Juneau's responsive brief in the Petersburg proceedings, and Juneau's comments, and that during the final hearing the Boundary Commission could amend the Petersburg petition. The Boundary Commission ultimately denied Juneau's request for consolidation or postponement, with one commissioner noting that "Juneau ... will have opportunities to comment and [provide] testimony at the hearing."

Juneau subsequently opposed Petersburg's petition "to the extent that it ask[ed] the [Boundary Commission] to approve incorporation of an area more appropriately annexed to [Juneau]." Juneau supported its position with a report from the Juneau Economic Development Council emphasizing Juneau's ties to the contested area, and argued that:

> Because the contested area has greater associations with [Juneau] than Petersburg, and because Petersburg cannot make the requisite constitutional, statutory, or regulatory showing justifying incorporation of the contested area into a new Petersburg borough, the [Boundary] Commission should amend Petersburg's petition to delete the contested ... area from Cape Fanshaw north to the current [Juneau] borough boundary from any approved Petersburg borough.

Petersburg responded that Juneau previously had declined to seek annexation of the disputed area, and emphasized its own economic, transportation, communication, and historic ties to the area. Petersburg conceded that its proposed northern boundary could move south to exclude Tracy Arm.[2] But Petersburg argued that for the remaining contested area, the borough incorporation factors weighed in Petersburg's favor.

In February 2012 Boundary Commission staff completed a preliminary report recommending that the Boundary Commission amend the proposed Petersburg Borough's boundaries—by removing all of Tracy Arm from the proposed borough to conform to the region's natural geography—but ultimately approve the Petersburg petition. Juneau submitted comments objecting to some of the report's recommendations. Juneau argued that only "one entity with respect to the

1. *See* 3 Alaska Administrative Code (AAC) 110.430 (2011) ("If two or more petitions pending action by the commission affect all or some portion of the same boundaries, the chair of the commission may consolidate the informational session, briefing schedule, department reports, commission hearing, decisional meeting, or other procedure under this chapter for one or more of those petitions. The commission may consider relevant information from concurrent or conflicting petitions during the process of rendering its decision on any one petition.").

2. The southern border of the City and Borough of Juneau is a diagonal line dividing the Tracy Arm watershed. The proposed Petersburg Borough's northern border abutted Juneau's southern border, dividing Tracy Arm between the boroughs.

same contested area" may satisfy the constitution's requirement that "[e]ach borough shall embrace an area and population with common interests to the maximum degree possible." [3] Juneau asserted that the Boundary Commission had to determine whether Juneau or Petersburg "would embrace the overlap area to the maximum degree possible," and that "[g]iven the Report's failure to critically analyze [Juneau's] claim to the contested area . . . any final determination based upon the Preliminary Report would be an abuse of the [Boundary Commission]'s discretion." Juneau argued that it had more common interests and was more closely related to the contested area than Petersburg.

In April the Boundary Commission held a preliminary hearing on the Petersburg petition. Juneau expressed concern that the Boundary Commission would "decide [the] Petersburg petition in a vacuum according to whether or not Petersburg standing alone meets the standards of incorporation." Juneau explained:

> [Juneau's] understanding is that the constitution requires [the Boundary Commission] to make decisions of these standards to the maximum degree possible. That you must make findings that wherever you're going to place this boundary the final municipality will have and share common interests with the area and population to the maximum degree possible.

Boundary Commission staff responded:

> [T]he [Boundary] Commission is going to decide whether to approve, amend or deny the Petersburg borough. In the course of making that decision it can take many things into account. It can take the petition, the comments on the petition, the briefs submitted, and it can take anything that has been spoken about at that hearing. But what it is doing is it is determining . . . does the Petersburg petition meet [the constitutional] standard or not . . . taking into account all of the information that it has already been given.

In May Boundary Commission staff produced a final report on Petersburg's petition. The report disagreed with Juneau's contention—that the Alaska Constitution requires that "any areas sought by more than one potential or existing borough should go the borough which has the stronger/strongest common interests"—explaining that "[n]either the constitution, the statutes, nor the regulations call for areas to be part of the best possible borough" and that under the constitution "a borough should be integrated and interrelated as much as possible." The final report reaffirmed the earlier report's findings and recommendation to approve the petition after moving the proposed borough's northern boundary south of Tracy Arm.

In late May and early June the Boundary Commission held a public hearing to address Petersburg's petition. At the hearing Juneau again argued that the Boundary Commission "must create boroughs that embrace common areas . . . and populations with common interests to the maximum degree possible. And that mandate by definition cannot apply to more than one entity." Juneau disagreed with the final report's assessment that the Alaska Constitution does not require areas be a part of the best possible borough. Juneau asserted that "it's incumbent on [the Boundary Commission] to reserve decision on the contested area until [the Boundary Commission] ha[s] throughly considered [Juneau's] competing claims."

The Boundary Commission held a decisional meeting and issued its final decision in August. At the decisional meeting commissioners referred to Juneau's common-interest arguments and noted "that you may not be able to get completely 100 percent common interests" and that common interests may be found across southeast Alaska. In its final decision the Boundary Commission explained:

> Juneau asserted that the proposed Petersburg borough must be compared to the existing City and Borough of Juneau in order to determine which borough would have common interests to the maximum degree possible with the overlapping area. After considering that claim, the [Boundary Commission] determines that the question is instead whether the proposed borough has an area and population with

3. Alaska Const. art. X, § 3.

> common interests to the maximum degree possible. The Boundary [C]ommission finds that the proposed borough does embrace an area and population with common interests to the maximum degree possible.

But the Boundary Commission also expressly noted that it "considered Juneau's claim to the overlapping area." The Boundary Commission approved the amended Petersburg petition, effectively leaving Tracy Arm for Juneau's later annexation, by a four to one vote.

Juneau appealed to the superior court, asserting that "[t]he constitutional mandate contained in Art[icle] X, sec[tion] 3 that boroughs embrace an area and population with common interests to the maximum degree possible cannot, by definition, apply to more than one entity." It argued that the Boundary Commission failed to determine whether Juneau or Petersburg "best meets the statutory and regulatory standards with respect to the contested area, and to draw boundaries in such a way that creates boroughs that are maximally cohesive." Juneau further asserted that the Boundary Commission "had before it not only its own earlier findings with respect to the model borough boundaries for the area, but it had substantially relevant evidence from [Juneau]. . . . Yet the [Boundary Commission] inexplicably failed to consider any of it." Juneau finally argued that accepting the Petersburg petition and including the overlapping area without considering Juneau's claim to the area was an abuse of the Boundary Commission's discretion.

The Boundary Commission responded that "[t]he underlying premise of Juneau's argument, that the [Boundary Commission] did not consider [Juneau's] evidence is false." The Boundary Commission argued that its decision "established optimal boundaries for the Petersburg Borough." The Boundary Commission concluded that its decision "should be affirmed as it is wholly supported by the record and there is a reasonable basis for the[ ] decision."

[1] Petersburg asserted that the Boundary Commission "heard, considered and discussed [Juneau's] evidence, both at the decisional meeting and in the decision itself." Petersburg argued that the constitution's common-interest mandate does not require the Boundary Commission "to determine the one, and only one, perfect borough for each region of Alaska" and thus the two petitions did not have to be addressed head-to-head. Petersburg finally argued that the de facto incorporation doctrine precluded Juneau from challenging the Petersburg Borough's existence, and moved to supplement the appellate record with an affidavit supporting its de facto incorporation argument.[4] The superior court denied that motion, finding "that the affidavit is not part of the record on appeal and that the record is adequate to conduct a proper review."

The superior court affirmed the Boundary Commission's decision approving the amended petition, noting that "Juneau's claim that the [Boundary] Commission failed to consider Juneau's competing claim to the contested territory fails because the record clearly shows that the [Boundary] Commission considered Juneau's evidence when it approved the Petersburg petition with modifications." The court explained that the Boundary Commission was tasked with determining the most appropriate boundaries for Petersburg, and that this task "involves a thorough consideration of alternative boundaries which includes the claim put forth by Juneau." The court therefore concluded that the Boundary Commission was not "required to undertake an inquiry into which municipality—Juneau or Petersburg—best meets the regulatory and statutory standards with respect to the contested area."

After the superior court affirmed the Boundary Commission's decision Petersburg

4. The de facto municipal incorporation doctrine precludes disincorporation when incorporation "is attempted under a proper statute, a good faith effort is made to comply with the statute, the statute is colorably complied with, and the municipality has exercised its powers in good faith." *Port Valdez Co. v. City of Valdez,* 522 P.2d 1147, 1156 (Alaska 1974). We have not yet decided whether the de facto incorporation doctrine has been abolished by statute. *Lake & Peninsula Borough v. Local Boundary Comm'n,* 885 P.2d 1059, 1064 n. 20 (Alaska 1994) ("We need not decide whether the Legislature meant to abolish both municipal and private *de facto* corporations . . . ."); *see* AS 10.06.218 ("The doctrines of de jure compliance, de facto corporations, and corporations by estoppel are abolished.").

moved for prevailing party attorney's fees, requesting 30% of its attorney's fees incurred during the administrative appeal—$9,594.60. The court granted the motion in part, awarding Petersburg $1,500 for attorney's fees.

Juneau now appeals the superior court's decision affirming the Boundary Commission's approval of the amended Petersburg petition. Petersburg cross-appeals the court's denial of its motion to supplement the record with evidence to support its de facto incorporation argument and the court's attorney's fees award.[5]

III. STANDARD OF REVIEW

[2–4] "As a general rule, we approach issues independently of the superior court when that court acts as an intermediate court of appeal."[6] "We apply different standards of review to agency decisions depending on the subject of review."[7] "In a review of agency action we substitute our judgment for that of the agency when interpreting the Alaska Constitution. . . ."[8]

[5] "The amount of attorney's fees to award under [former Alaska Appellate] Rule 508(e) is 'a matter committed to the sound discretion of [the] trial courts, when sitting as intermediate appellate tribunals.' "[9]

IV. DISCUSSION

A. The Boundary Commission Satisfied The Constitutional Requirement That A Borough Maximize Common Interests.

1. Relevant constitutional, statutory, and regulatory provisions

Article X of the Alaska Constitution addresses local government. Article X, section 1 provides: "The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions." Article X, section 3 requires that the entire state be divided into organized or unorganized boroughs "in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible."

The constitution authorizes the creation of the Boundary Commission: Article X, section 12 provides that "[a] local boundary commission or board shall be established by law . . . [and] may consider any proposed local government boundary change." We have explained that the Boundary Commission was created because "local political decisions do not usually create proper boundaries and . . . boundaries should be established at the state level."[10] Alaska Statute 44.33.812 describes some of the Boundary Commission's powers and duties: "The Local Boundary Commission shall . . . adopt regulations providing standards and procedures for municipal incorporation, annexation, detachment, merger, consolidation, reclassification, and dissolution. . . ."

Under AS 29.05.031 an area may incorporate as a borough if it satisfies population, geographic boundary, economic, and transportation criteria. And under AS 29.05.100(a) the Boundary Commission may accept an incorporation petition upon finding that the petition meets constitutional, statu-

5. Because we affirm the superior court's decision affirming the Boundary Commission's incorporation decision, we do not need to decide whether the de facto incorporation doctrine precludes a challenge to an incorporation decision or whether the superior court abused its discretion by denying Petersburg's motion to supplement the record with evidence to support its de facto incorporation arguments.

6. *Lake & Peninsula Borough Assembly v. Oberlatz,* 329 P.3d 214, 221 (Alaska 2014) (quoting *City of Nome v. Catholic Bishop of N. Alaska,* 707 P.2d 870, 875 (Alaska 1985)).

7. *Davis Wright Tremaine LLP v. State, Dep't of Admin.,* 324 P.3d 293, 298–99 (Alaska 2014).

8. *Alaska Fish & Wildlife Conservation Fund v. State,* 347 P.3d 97, 102 (Alaska 2015).

9. *Titus v. State, Dep't of Admin., Div. of Motor Vehicles,* 305 P.3d 1271, 1282 (Alaska 2013) (quoting *Rosen v. State Bd. of Pub. Accountancy,* 689 P.2d 478, 482 (Alaska 1984)).

10. *Fairview Pub. Util. Dist. No. One v. City of Anchorage,* 368 P.2d 540, 543 (Alaska 1962).

tory, and regulatory requirements and that incorporation "is in the best interests of the state." The Boundary Commission's regulations further delineate the requirements for borough incorporation,[11] and establish procedures for reviewing petitions.[12]

2. Juneau's preliminary arguments regarding the Boundary Commission's decision not to consolidate the petitions and the evidence considered by the Boundary Commission

The discretionary consolidation or concurrent consideration of conflicting petitions is authorized by 3 AAC 110.430.[13] Juneau has not challenged this regulation's validity on appeal, and Juneau concedes it "is not suggesting that the [Boundary Commission] was required to consolidate its petition proceedings with [Petersburg's]." But Juneau nonetheless accuses the Boundary Commission of "applying the doctrine of prior jurisdiction," [14] and asserts that by doing so Juneau was precluded from providing adequate evidence to the Boundary Commission.

Juneau argues that although the Boundary Commission first stated it would consider Juneau's petition, it contradicted itself and determined that it "would only consider comments and briefing related to the Petersburg petition." And Juneau argues that at the decisional hearing "[Juneau] was limited to presenting only those arguments it had presented in its responsive brief to the Petersburg petition. [Juneau] was prohibited from using its own annexation petition or supporting documents—even as demonstrative aids to its witnesses' testimony."

The record does not support Juneau's assertions. The record establishes that the Boundary Commission considered Juneau's alternative consolidation and postponement requests, recognized its own discretionary authority, and exercised its discretion to not consolidate the petitions or let Juneau's petition catch up by postponing consideration of the Petersburg petition. This was not an application of the doctrine of prior jurisdiction, but rather was an exercise of agency discretion that Juneau does not otherwise contest.

The record also establishes that the Boundary Commission allowed Juneau to submit evidence and that the Boundary Commission considered Juneau's evidence—indeed, during oral argument before us Juneau was unable to identify any point in the record when it was precluded from submitting specific evidence that it wanted to submit. Juneau cited to its own annexation petition in the Petersburg proceedings, submitted a report attempting to establish its closer connection to the disputed area, and had witnesses testify at the Petersburg decisional hearing. And the Boundary Commission's

11. *See* 3 AAC 110.045 (providing list of factors to consider, and requiring that "the social, cultural, and economic characteristics and activities of the people in a proposed borough must be interrelated and integrated"); 3 AAC 110.050 (providing list of factors to consider, and requiring that "[t]he population of a proposed borough must be sufficiently large and stable to support the proposed borough government"); 3 AAC 110.055 (providing list of factors to consider, and requiring that "the economy of a proposed borough must include the human and financial resources necessary to provide the development of essential municipal services on an efficient, cost-effective level"); 3 AAC 110.060 (providing list of factors to consider, and requiring that "the boundaries of a proposed borough must conform generally to natural geography, must be on a regional scale suitable for borough government, and must include all land and water necessary to provide the full development of essential municipal services on an efficient, cost-effective level"); 3 AAC 110.065 (providing list of best interests factors to consider).

12. 3 AAC 110.400–.700.

13. *See supra* note 1.

14. Before the enactment of 19 AAC 10.835 (1988), since revised and rewritten as 19 AAC 10.430 (1992), and then relocated to 3 AAC 110.430 (1999), "[t]he [Boundary Commission] ha[d] no statutes or regulations that control[led] the situation where two municipalities propose[d] to annex some or all of the same territory." Overlapping Annexation Proposals, 1986 INFORMAL OP. ATT'Y GEN. 341. Thus, in an informal opinion, the attorney general's office recommended applying the common law doctrine of prior jurisdiction. *Id.* "Generally stated, the doctrine is one of first in time, first in right; the first [municipality] to initiate proceedings . . . has priority, to the exclusion of any other [municipality]. . . ." *Id.*

final decision expressly considered Juneau's claim to the overlapping area when amending the Petersburg petition: Boundary Commission commissioners noted Juneau's arguments that the contested area was tied to Juneau and "also considered Juneau's advocacy of its ties to the area" before ultimately approving the proposed Petersburg borough, with an amendment excluding Tracy Arm.

3. Juneau's constitutional argument[15]

[6, 7] Juneau asserts that under the Alaska Constitution the Boundary Commission must "make boundary determinations from a statewide perspective after ensuring that the resulting borough will encompass a population and area with common interests to the maximum degree possible." Juneau argues that the Boundary Commission violated its constitutional obligation to make borough decisions from a statewide perspective when it refused to conduct a head-to-head analysis to determine whether Juneau or Petersburg "had superior common interests to the contested area."

Juneau primarily relies on our decision in *Petitioners for Incorporation of City & Borough of Yakutat v. Local Boundary Commission.*[16] In *Yakutat* the Boundary Commission had amended an incorporation petition's proposed boundaries before ultimately approving the amended petition.[17] The petitioners appealed, arguing that the Boundary Commission was not authorized to alter the proposed boundaries "without first determining that the proposed borough, with its boundaries unaltered, would fail to meet the statutory standards for incorporation." [18] We concluded that the Boundary Commission could not "alter boundaries of proposed boroughs without any preliminary finding of noncompliance." [19] But noting that the Boundary Commission's statutory powers must be interpreted in accordance with article X, section 3's requirement that "[e]ach borough shall embrace an area and population with common interests to *the maximum degree possible,*" [20] we explained:

> [T]he provisions of AS 29.05.100(a) dealing with the rejection, acceptance, and alteration of proposed boroughs must be interpreted to require that the [Boundary Commission] apply the statutory standards for incorporation in the relative sense implicit in the constitutional term "maximum degree possible." In other words, AS 29.05.100(a) must be construed to mean that, in deciding if the statutory standards for incorporation have been met, the Boundary Commission is required to determine whether the boundaries set out in a petition embrace an area and population with common interests to the maximum degree possible.[21]

We further explained that "[a]n informed decision as to whether boundaries proposed in a petition for incorporation maximize the common interests of the area and population and thus meet the applicable statutory standards presupposes a thorough consideration of alternative boundaries and a decision as to what boundaries would be optimal." [22]

We ultimately concluded that the Boundary Commission impliedly found the unamended petition failed to maximize common interests "because the commission believed that the affected area lacked sufficient cohesiveness to the remaining area of the borough and enjoyed greater ties and common interests with the Prince William Sound area." [23] We held that the Boundary Com-

15. "In construing a constitutional provision, we must give it a reasonable and practical interpretation in accordance with common sense and consonant with the plain meaning and purpose of the provision and the intent of the framers." *Sullivan v. Resisting Envtl. Destruction on Indigenous Lands (REDOIL),* 311 P.3d 625, 629 (Alaska 2013) (quoting *Legislative Council v. Knowles,* 988 P.2d 604, 607 n. 11 (Alaska 1999)) (internal quotation marks omitted).

16. 900 P.2d 721 (Alaska 1995).

17. *Id.* at 722.

18. *Id.*

19. *Id.* at 725.

20. *Id.* (emphasis added) (quoting Alaska Const. art. X, § 3).

21. *Id.*

22. *Id.*

23. *Id.* at 726–27.

mission is not required to "approve any minimally acceptable petition for incorporation.... [And] the [Boundary Commission] acted well within the purview of its authority in considering the desirability of future incorporation of neighboring areas such as Prince William Sound and the interests of affected land owners and users...." [24]

Juneau argues that "the *Yakutat* case stands for the proposition that the [Boundary Commission] has no discretion to ignore a competing petition.... [T]he [Boundary Commission] must fully consider both petitions before making a boundary determination as to any contested area; it cannot make a constitutionally valid boundary determination without doing so." Juneau further argues that the Alaska Constitution "does not simply require that 'the' resulting borough 'embrace an area and population with common interests to the maximum degree possible;' it requires that 'each' borough meet that constitutional standard." [25] Finally Juneau argues that in *Yakutat* we approved the Boundary Commission's comprehensive approach, focusing on the regional effect of a proposed borough boundary and ensuring that other boroughs in addition to the proposed Yakutat borough would maximize common interests.

While the framers' use of the word "each" requires consideration of optimal or alternative boundaries for any proposed borough, the constitution does not mandate the head-to-head analysis Juneau seeks. In *Yakutat* we explained that the Boundary Commission's task is to determine "whether an area is cohesive and prosperous enough for local self-government." [26] We affirmed the Boundary Commission's determination that amended boundaries were the most appropriate for Yakutat, noting the Boundary Commission's specific findings that the proposed Yakutat borough did not have sufficient common interests with a specific area included in the incorporation petition.[27] Although we noted that the Prince William Sound area probably had greater ties to the removed area, we emphasized the Boundary Commission's broad discretion to analyze alternative boundaries and determine the " 'most appropriate boundaries' for *the proposed borough.*" [28] We did not require analyzing whether Yakutat's petition included only areas that had greater common interests with Yakutat than any other potential borough; rather we affirmed the Boundary Commission's determination of the most desirable boundaries for the Yakutat borough.[29]

But even though the Boundary Commission was not required to analyze the Juneau and Petersburg petitions head-to-head, the Boundary Commission had to determine whether the proposed Petersburg borough "embrace[d] an area with common interests to the maximum degree possible." [30] And this common-interest determination "presupposes a thorough consideration of alternative boundaries and a decision as to what boundaries would be optimal." [31] Contrary to Juneau's assertions, the Boundary Commission did not disclaim a duty to make decisions from a statewide perspective. Rather the Boundary Commission noted that it was not necessarily required to conduct a head-to-

24. *Id.* at 727.

25. Juneau's briefing to us also mentions its argument to the trial court:

> [A]s the [Boundary Commission] had already made findings with respect to the area's model borough boundaries with relation to [Juneau], and as [Juneau] had significant and demonstrable ties to the unorganized remnant area, it was incumbent on the [Boundary Commission] to reserve decision on the unorganized remnant area until it had thoroughly considered [Juneau's] claims.

Juneau has not adequately briefed this argument on appeal and it is therefore waived. *See Wilson v. State, Dep't of Law,* 355 P.3d 549, 557 (Alaska 2015) (refusing to consider an inadequately briefed argument). We note that even had Juneau raised this argument, the model borough boundaries are a factor that the Boundary Commission *may* consider. 3 AAC 110.060(b).

26. *Yakutat,* 900 P.2d at 726 (quoting *Mobil Oil Corp. v. Local Boundary Comm'n,* 518 P.2d 92, 98 (Alaska 1974)).

27. *Id.* at 727 & n. 6.

28. *Id.* at 725–27 (emphasis added).

29. *Id.*

30. Alaska Const. art. X, § 3.

31. *Yakutat,* 900 P.2d at 725.

head analysis of the competing petitions. And our earlier discussion of the Boundary Commission's full consideration of Juneau's evidence and arguments makes clear that the Boundary Commission fulfilled its duty.

We therefore conclude that the Boundary Commission satisfied article X, section 3 and affirm the decision approving the amended Petersburg petition.

B. The Superior Court Did Not Abuse Its Discretion When Granting Partial Attorney's Fees.

[8, 9] Petersburg argues that the superior court should have awarded at least 30% of its fees incurred during the administrative appeal because: (1) the agency record was 1,658 pages long "and featured multiple factual and legal arguments"; and (2) "[t]he issues in the appeal were of substantial importance to [Petersburg]. . . ." When the superior court awarded attorney's fees Alaska Appellate Rule 508(e) provided: "Attorney's fees may be allowed in an amount to be determined by the court." [32] In administrative appeals:

> The extent to which litigants have been involved in prior administrative proceedings, and the cost thereof, as well as the nature of judicial review and its cost, are factors which a trial court may wish to consider in determining the application of Appellate Rule 508(e). Likewise, the importance to the litigants of rights asserted is a factor to be considered.[33]

The court had discretion whether to award any attorney's fees at all, and when awarding fees the court had discretion to award any reasonable amount. Although the length of the administrative record, the complexity of arguments, and the importance of the issues on appeal may have been sufficient to support a conclusion that a 30% attorney's fees award was reasonable, they are insufficient to establish that the superior court's decision to award a substantially smaller amount necessarily was manifestly unreasonable.[34] We therefore affirm the superior court's attorney's fees award.

V. CONCLUSION

We AFFIRM the superior court's decision upholding the Boundary Commission's approval of Petersburg's incorporation petition as amended, and we AFFIRM the superior court's attorney's fees award to Petersburg.

32. The superior court's order is dated April 24, 2014 and is subject to an earlier version of Rule 508. Rule 508(e) has since been amended by Supreme Court Order 1843 and now provides: "Attorney's fees shall not be awarded unless (1) attorney's fees are provided by statute, caselaw, or contract; . . . [or] (4) the appeal was taken under Rule 601, in which case the court shall award the prevailing party 20% of its actual attorney's fees that were necessarily incurred. . . ." Rule 601 "applies to requests to the superior court to review decisions of the district court or an administrative agency . . . either by appeal or by petition for review."

33. *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1038–39 (Alaska 2005) (quoting *Rosen v. State Bd. of Pub. Accountancy*, 689 P.2d 478, 482–83 (Alaska 1984)).

34. We will overturn an attorney's fees award only if it is manifestly unreasonable. *Id.* at 1038.